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C.T.O.P.I

A TREATISE

ON THE LAW OF

MASTER AND SERVANT,

INCLUDING THEREIN

MASTERS AND WORKMEN,

IN EVERY DESCRIPTION OF TRADE AND OCCUPATION;

WITH AN APPENDIX OF STATUTES.

BY

CHARLES MANLEY SMITH, ESQUIRE,

BARRISTER-AT-LAW,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT.

"*Masters*, give unto your servants that which is just and equal; knowing that ye also have a Master in Heaven."—*Col.* iv. 1.

"*Servants*, obey in all things your masters according to the flesh; not with eye-service, as men pleasers; but in singleness of heart, fearing GOD."—*Col.* iii. 22.

"Servi sunt, imo homines: servi sunt, imo contubernales: servi sunt, imo humiles amici: servi sunt, imo conservi."—*Senec. Ep.* xlvii.

The Second Edition.

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Vivendum recte, cum propter plurima, tunc his
Præcipue causis, ut linguas mancipiorum
Contemnas, nam lingua mali pars pessima servi.

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TO

THE RIGHT HONORABLE

SIR WILLIAM ERLE, KNIGHT,

Lord Chief Justice of Her Majesty's Court of Common Pleas,

THIS WORK

IS

(WITH HIS PERMISSION)

INSCRIBED

BY HIS OBLIGED AND OBEDIENT HUMBLE SERVANT,

THE AUTHOR.

756639

PREFACE

TO THE SECOND EDITION.

That the Author was not far wrong in his impression that a Work on the Law of Master and Servant was *wanted*, both by the Profession and the Public, is sufficiently proved by the demand for a Second Edition of the result of his humble endeavours to supply that want. That demand would have been yielded to at an earlier period but for the hope entertained by the Author, that the Statute Law Commissioners would have been enabled to have procured the passing into a Law of the Bill prepared for them by Mr. Warrington Rogers for consolidating the Statute Law relating to Masters and Servants, and Masters and Workmen (*a*).

All chance of the realization of the Author's hopes in this respect appearing, however, for the present at least, to have passed away, he feels that he should not be justified in any longer delaying to offer to the Profession and the Public another Edition of his little Work, as numerous decisions have taken place, and various Statutes have been passed affecting matters therein treated of, since the first Edition was published.

Besides a vast number of English, Scotch, and Irish decisions, a great many American cases have been added to this Edition; and no pains have been spared to render the Work worthy of that kind patronage which has already been bestowed upon it.

(*a*) See further on this subject, *post*, p. 1.

The only material alteration in the arrangement of the Work from that pursued in the former Edition, is in the transferring from Chapter V. to Chapter IV. of the cases upon the subject of a Master's liability to his Servant for injuries sustained through the negligence of a fellow-servant. As those cases appear more properly to range themselves under the head of a Master's duty to indemnify his Servant from the consequences of obeying his commands, than as an exception to a Master's general liability for the acts of his Servant, they have accordingly been placed in Chapter IV.

In a future Edition, the statement of those cases may probably be curtailed without disadvantage; but the principle established by them appears, at present, to be scarcely so completely developed in all its bearings as to justify a shorter statement of them in this Edition. This remark especially applies to the question, Who are fellow-workmen within the meaning of the rule? In answering which, great assistance will be derived from a careful consideration of the cases in which the rule itself has been laid down and applied.

1, Hare Court, Temple,
March, 1860.

PREFACE

TO THE FIRST EDITION.

THERE are so few persons not interested in the law applicable to the relationship of Master and Servant, either in one capacity or the other, that the publication of a Treatise upon that subject may seem to most people to require but little apology. With *professional* men, however, the case is somewhat different. They have been so long accustomed, when any question of law arising out of the relationship of Master and Servant has been brought before them, to refer, if necessary, to works of *general* application, such as treatises on contracts, agency, or criminal law, or to digests, indices, and abridgments; that *they* may perhaps hardly have felt the want of a separate Work upon the law of Master and Servant. But it is conceived that even professional men may be more truly said to have become *used to the want* of such a Work, than not to have felt it. It is, at least, to the existence of a strong impression upon the mind of the Author that such was the case, and that a Book exclusively devoted to the subject he has attempted to elucidate *was wanted*, combined with a desire on his part to supply what he considered a deficiency in the list of legal publications, that the present Work owes its origin. In it he has attempted to concentrate all (*a*) that information upon the subject treated of

(*a*) A Chapter on the Law of Settlement by Hiring and Service was partially prepared, but the addition of it would necessarily add much both to the size and price of this Volume. Upon further reflection, therefore, the Author has determined to *omit* it, and this, the rather, as the subject daily *decreases* in importance, and questions upon it now seldom arise. See *post*, p. 1, n. (*b*).

which has hitherto been diffused through *many* books. How far he has succeeded in his object it is not for himself to determine. Whilst, however, on the one hand, he is well aware that many defects may, and not improbably will, be discovered in the following Work; on the other hand, he ventures to express his hopes that it will not be found altogether useless, even to the members of his own Profession; who, he trusts, will receive it with that indulgence which they are ever wont to accord to the efforts of their younger brethren. And if it shall be found by experience that the Author has so far succeeded in his undertaking as to have acted the part of a pioneer only upon a path hitherto, if not altogether untrodden, at least but imperfectly explored, he will be sufficiently compensated for his labours by the reflection that his leisure hours, which the present abnormal condition of his Profession has rendered more than usually numerous, have not been altogether misspent, whilst devoted to the preparation of this Work.

MIDDLE TEMPLE,
Trinity Term, 1852.

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ALPHABETICAL TABLE.

SHOWING THE VARIOUS STATUTES APPLICABLE TO WORKMEN, &c. IN PARTICULAR TRADES, &c.; UNDER MANY OF WHICH JURISDICTION IS GIVEN TO MAGISTRATES (*a*).

ARTIFICERS, HANDICRAFTSMEN, MINERS, COLLIERS, KEELMEN, PITMEN, GLASSMEN, POTTERS, LABOURERS AND SERVANTS IN HUSBANDRY.

20 Geo. 2, c. 19, *post*, p. 326.
6 Geo. 3, c. 25, *post*, p. 329.
4 Geo. 4, c. 34, *post*, p. 332.

BALLASTMEN (except Trinity Ballastmen). See *Bargemen.*

BARGEMEN, LIGHTERMEN, WATERMEN, BALLASTMEN (except Trinity Ballastmen), COALWHIPPERS, COAL PORTERS, SAILORS, LUMPERS, RIGGERS, SHIPWRIGHTS, CAULKERS or other labourers who work for hire in and upon the River Thames, or the docks, creeks, wharves, quays or places adjacent, not being in the city of London or the liberties thereof, and the Owners, Masters or Commanders of Vessels, or their Agents, on the said river, or the docks or creeks thereunto adjoining, or the Owners, Wharfingers or Occupiers of such wharves or quays, or their Agents or other Employers; respecting wages or money due to such labourers for work or loss of time, whether the same persons be employed for any certain time or in any other manner.

2 & 3 Vict. c. 71, s. 37.

BONE AND THREAD LACE MANUFACTURERS.

19 Geo. 3, c. 49, ss. 3, 4 (Rest repealed by 1 & 2 Will. 4, c. 36).

BOOT AND SHOEMAKERS. See *Leather* and *Shoemakers.*

BREECHES MAKERS. See *Leather* and *Tailors.*

CALICO PRINTERS.

6 Geo. 3, c. 25, *post*, p. 329.
4 Geo. 4, c. 34, *post*, p. 332.

CAPMAKERS. See *Hatmakers.*

CAULKERS. See *Bargemen.*

CHIMNEYSWEEPS. 3 & 4 Vict. c. 85, *post*, p. 8, note (*l*).

CLOCK AND WATCHMAKERS. 27 Geo. 2, c. 7.

CLOTHIERS.

7 Jac. 1, c. 7.
14 Geo. 3, c. 25;
And see *Woollen Manufacturers.*

COAL MINES INSPECTION. 18 & 19 Vict. c. 108, *post*, p. 533.

COAL PORTERS. See *Bargemen.*

(*a*) The Truck Act, 1 & 2 Will. 4, c. 37, *post*, p. 417, applies to most trades. See sect. 19.

COALWHIPPERS.
14 & 15 Vict. c. 78, s. 24.
17 & 18 Vict. c. 104, s. 188;
And see *Bargemen.*

COLLIERIES.
5 & 6 Vict. c. 99, *post*, p. 440.

COLLIERS. See *Artificers, Miners* and 40 Geo. 3, c. 77 (except sects. 1 and 5, which were repealed by 7 & 8 Geo. 4, c. 27, and other provisions substituted by) 7 & 8 Geo. 4, c. 29, s. 37, and c. 30, s. 6.

COTTON MANUFATORIES. See *Factories, Hosiery* and
1 Ann. st. 2, c. 18 (made perpetual 9 Ann. c. 30).
13 Geo. 2, c. 8.
22 Geo. 2, c. 27. See Appendix, p. 381.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. See Appendix, p. 393.

DYERS AND HOTPRESSERS.
22 Geo. 2, c. 27. See Appendix, p. 381 (sect. 12 was partly repealed by 6 Geo. 4, c. 129, *post*, p. 352, and 9 Geo. 4, c. 31; and as to wages by 1 & 2 Will. 4, c. 36, see c. 37, *post*, p. 417).
17 Geo. 3, c. 56. See sect. 17, Appendix, p. 404. (This Act was not repealed as to Dyers by 6 & 7 Vict. c. 40, Appendix, p. 445. See *R.* v. *Button*, 11 Q. B. 941).

FACTORIES.
42 Geo. 3, c. 73. Appendix, p. 408.
3 & 4 Will. 4, c. 103. Appendix, p. 427.
4 & 5 Will. 4, c. 1. Appendix, p. 429, note.
7 & 8 Vict. c. 15. Appendix, p. 458.
10 & 11 Vict. c. 29. Appendix, p. 521.
13 & 14 Vict. c. 54. Appendix, p. 526.
16 & 17 Vict. c. 104. Appendix, p. 531.
19 & 20 Vict. c. 38. Appendix, p. 538.

FELT. See *Hatmakers.*

FLAX.
22 Geo. 2, c. 27. Appendix, p. 381.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. Appendix, p. 393.
And see *Factories, Hosiery, Ropeworks.*

FUR. } 22 Geo. 2, c. 27. Appendix, p. 381.
FUSTIAN. } 17 Geo. 3, c. 56. Appendix, p. 393.

GLASSMEN. See *Artificers.*

GLOVEMAKERS. See *Hosiery* and *Leather.*

HACKNEY CARRIAGES. Disputes between Proprietors and Drivers.
1 & 2 Will. 4, c. 22, s. 29.
6 & 7 Vict. c. 86.
13 & 14 Vict. c. 7.
16 & 17 Vict. c. 33.

HAIR. See *Mohair.*

HANDICRAFTSMEN. See *Artificers.*

HATMAKERS.
22 Geo. 2, c. 27. Appendix, p. 381.
17 Geo. 3, c. 11.
17 Geo. 3, c. 55 (as to sects. 3 and 4, see 6 Geo. 4, c. 129, *post*, p. 352).
17 Geo. 3, c. 56. Appendix, p. 393.

HEMP, MANUFACTURERS OF HEMP, OR HEMP MIXED WITH WOOL, FUR, FLAX, MOHAIR OR SILK.

22 Geo. 2, c. 27. Appendix, p. 381.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. Appendix, p. 393.
And see *Factories, Hosiery, Ropeworks.*

HOSIERY. Persons engaged in the manufacture of woollen, worsted, linen, cotton, flax, mohair or silk materials in, on, or by the stocking frame, warp machine, or any other machine employed in the manufacture of framework, knitted or looped fabrics, and every trade, occupation, operation or employment whatsoever connected with or incidental to the manufacture of stockings, gloves and other articles of hosiery.

6 & 7 Vict. c. 40. Appendix, p. 445.
Tickets of work (pursuant to 5 Geo. 4, c. 96, s. 18), 8 & 9 Vict. c. 77. Appendix, p. 514.

HOTPRESSERS. See *Dyers.*

HUSBANDRY, SERVANTS IN. See *Artificers.*
Note.—1 & 2 Will. 4, c. 37, does *not* apply to servants in husbandry: see sect. 20, *post*, p. 423.

IRON.

22 Geo. 2, c. 27. Appendix, p. 381.
17 Geo. 3, c. 56. Appendix, p. 393.

JAPANNED GOODS.

1 & 2 Will. 4, c. 37. Appendix, p. 417.

JUTE. See *Ropeworks.*

KEELMEN. } See *Artificers, Bargemen.*
LABOURERS. }

LACE. See *Bone and Thread Lace Manufacturers.*

LEATHER—MANUFACTURERS OF LEATHER BREECHES, GLOVES, &c.

1 Ann. stat. 2, c. 18, made perpetual 9 Ann. c. 30.
13 Geo. 2, c. 8, s. 4.
22 Geo. 2, c. 27. Appendix, p. 381.
17 Geo. 3, c. 56. Appendix, p. 393.

LIGHTERMEN. See *Bargemen.*
Thames, 22 & 23 Vict. c. cxxxiii.

LINEN.

22 Geo. 2, c. 27. Appendix, p. 381.
14 Geo. 3, c. 44.
15 Geo. 3, c. 14.
17 Geo. 3, c. 56. Appendix, p. 393.
22 Geo. 3, c. 40.
6 & 7 Vict. c. 40. Appendix, p. 445.
And see *Factory, Hosiery.*

LUMPERS. See *Bargemen.*

MILLS. See *Factory, Silk.*

MINERS. See *Artificers, Colliers.*
As to *Women* and *Children* employed in Mines, 5 & 6 Vict. c. 99, Appendix, p. 440.

——— IN CORNWALL. 2 & 3 Vict. c. 58, s. 1.

——— DEVON. 18 & 19 Vict. c. 32, s. 28.

MOHAIR. See *Hemp, Hosiery, Linen.*

PAPERMAKERS.
36 Geo. 3, c. 111, was repealed, 6 Geo. 4, c. 129.

PITMEN. See *Artificers, Colliers, Miners, Tinmen.*

POTTERS. See *Artificers.*

PRINTWORKS, EMPLOYMENT OF WOMEN AND CHILDREN IN.
8 & 9 Vict. c. 29. Appendix, p. 493.
9 & 10 Vict. c. 18. Appendix, p. 504, note (*x*).
10 & 11 Vict. c. 70. Appendix, p. 522.

RIGGERS. See *Bargemen.*

ROPEWORKS. Certain Ropeworks declared not to be within the Factory Acts.
9 & 10 Vict. c. 40. Appendix, p. 458, note (*t*).

SAILORS. } See *Bargemen.*
SHIPWRIGHTS. }

SHOEMAKERS, JOURNEYMEN.
9 Geo. 1, c. 27.

SILK. See *Factory, Hosiery* and,
14 & 15 Car. 2. c. 15 }
20 Car. 2, c. 6 } as to Throwers, Winders and Doublers.
8 & 9 Will. 3, c. 36 }
(The 13 Geo. 3, c. 68; 32 Geo. 3, c. 44, and 51 Geo. 3, c. 7, were repealed, 5 Geo. 4, c. 66).
22 Geo. 2, c. 27. Appendix, p. 381.
14 Geo. 3, c. 44.
17 Geo. 3, c. 56. Appendix, p. 393.

—— WEAVER'S TICKET OF WORK (pursuant to 5 Geo. 4, c. 96, s. 18).
8 & 9 Vict. c. 128. Appendix, p. 519.

STEEL. See *Iron.*

STOCKINGS. See *Hosiery.*

TAILORS. 7 Geo. 1, stat. 1, c. 12, ss. 4, 6, 9, 10. Rest repealed, 6 Geo. 4, c. 129.

TINNERS IN THE STANNARIES.
20 Geo. 2, c. 19, *post*, p. 326. (See 27 Geo. 2, c. 6).
4 Geo. 4, c. 34, *post*, p. 332.

TOW. See *Hemp* and *Ropeworks.*

WATCHMAKERS. See *Clockmakers.*

WATERMEN, THAMES. See *Bargemen.*
22 & 23 Vict. c. cxxxiii.

WOOLLEN AND WORSTED MANUFACTURES. See *Clothiers, Factory, Hosiery.*
12 Geo. 1, c. 34, ss. 2 and 5.
(13 Geo. 1, c. 23, was repealed, 3 & 4 Will. 4, c. 28).
22 Geo. 2, c. 27. Appendix, p. 381.
14 Geo. 3, c. 44.
15 Geo. 3, c. 14.
17 Geo. 3, c. 11. In the counties of York, Lancaster and Cheshire.
17 Geo. 3, c. 56. Appendix, p. 393.
22 Geo. 3, c. 40.

INTRODUCTION.

In treating of the Law applicable to the relationship of Master and Servant as it exists in England at the present day, it seems to be unnecessary to enter into any discussion of the various opinions which have been expressed by different authors as to the first origin of that relationship (*a*); for since it is obvious that, in the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others, and it is also clear that slavery does not now (*b*) exist, in any shape, in England, where every man is, and (according to that memorable sentiment expressed in the will of Alfred the Great) it is fit that every Englishman should ever remain, as free as his own thoughts, it seems to follow inevitably, not only that the relationship of master and servant must exist, but also that wherever it does exist in this country it must be by virtue of some agreement, either express or implied, between the parties. Puffendorf (*c*), too, refers its first origin to contract: he says, "the first rise of servitude is owing to the voluntary consent of the poorer and

(*a*) The curious on this subject may consult Puff. de Jure Nat. ac Gent., lib. 6, cap. 3, where various opinions are discussed; and see Co. Litt. 116 *b*; Bl. Com. vol. i. ch. 14; Encyc. Brit. tit. "Slavery." Grotius divides servitude into perfect and imperfect, and, amongst the latter, classes *mercenarii*:—"Inter quos," he says, "ii qui in Anglia *apprentisii* dicuntur durante disciplinæ suæ tempore, proxime ad servilem conditionem accedunt," lib. 2, cap. 5, sec. 30; and M. Barbeyrac, in his notes, refers to Thom. Smith de Republ. Anglic. lib. 3, cap. 10.

(*b*) During the Anglo-Saxon times, slaves were one of the principal English exports. Strabo, l. 4 p. 199 (ed. Paris, 1620); Barr. on Stat. 274; Russ. Mod. Eur., note to P. S. to Letter xx. Now, no action can be brought in England for the noncompletion of a contract for the purchase of slaves, even in Brazil, *Santos* v. *Illidge*, 28 L. J., C. P. 317. This case now stands over for judgment in the Exchequer Chamber.

(*c*) Puff. lib. 6, cap. 3, sect. 4. Blackstone (vol. i. ch. 14), says "The relationship of master and servant is founded in *convenience*," and he evidently means, that *convenience* induces men to enter into the *contract*, whence the relationship arises.

more helpless persons, and is founded upon that common form of contract — *Do, ut facias.*"

But, whatever its origin, servitude, in some shape or other, has clearly existed from the remotest antiquity; and without inquiring into the condition of the slave amongst the ancient Grecians and Romans, which might be considered irrelevant to the object more immediately in view in the following pages, it may be convenient to offer a few remarks upon the state of the slave, or vilein, in this country, whose condition had most of the incidents of slavery, and to trace the progress of English legislation with reference to that class of persons, commonly called servants and labourers, who in most respects supply the places formerly occupied by vileins, though their condition is far superior.

Both among the German Saxons and among the Anglo-Saxons slaves or vileins were divided into two classes, — household slaves (*d*), after the manner of the ancients, and predial, or rustic, who were transferred like cattle with the soil (*e*); though there does not appear to have been much difference between the two as to their condition. The power of a master over his slaves appears not to have been unlimited among the Anglo-Saxons as it was among their ancestors. If a man beat out his slave's eye or teeth, the slave recovered his liberty; if he killed him, he paid a fine to the King, provided the slave died within a day after the wound or blow, otherwise it passed unpunished (*f*).

Whether or not the feudal law had place at all among the Anglo-Saxons is a doubtful question (*g*); but its introduction does not appear to have ameliorated the condition of the slaves or vileins, except in so far as it tended to promote the civilization of their masters, who, as long as villenage lasted, had an

(*d*) In Kent's Comm., Lec. 32, vol. ii. p. 204, it is said, that domestic slavery existed throughout the United States when they were colonies of Great Britain. "But," adds the learned author (p. 206), "after the era of our Independence the principles of natural right and civil liberty were better known and obeyed, and domestic slavery speedily and sensibly felt the genial influence of the Revolution."

(*e*) See Hume's Hist. Engl. vol. i. chap. 3, App. 1; Spel. Gloss. Verb. Servus; Russ. Mod. Eur. part 1, Letter viii.

(*f*) Leges Ælf. § 17. This seems to be borrowed from the Jewish law, Exod. xxi. 20, 21, 26, 27.

(*g*) See Hume's Hist. Engl. vol. i. App. 2 to ch. 11; Hall. Mid. Ages, vol. i. ch. 2, p. 2; Encyc. Brit. tit. "Feodal System."

almost absolute power over them. Their service was uncertain and indeterminate, such as their lord thought fit to require, or, as some old writers express it, they knew not in the evening what they were to do in the morning (*h*); they were bound to do whatever they were commanded. They were liable to beating, imprisonment, and every other chastisement which their lord might prescribe, except killing and maiming. They were incapable of acquiring property for their own benefit, except by their lord's sufferance or permission,—the rule being, *quicquid acquiritur servo acquiritur domino* (*i*). They were themselves the subject of property; as such, saleable and transmissible. If vileins regardant, they passed with the manor or land to which they were annexed, but they might be severed at the pleasure of the lord. If vileins in gross, they were hereditaments or chattels real, according to their lord's interest being descendible to the heir when the lord was absolute owner, and transmissible to the executor when he had only a term of years in him. Lastly, the slavery extended to the issue if both parents were vileins, or if the father only was a vilein; our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was, *partus sequitur ventrem* (*k*). Larceny could not be committed by taking and carrying away a vilein; "because," says Lord Coke, "they are in the realty" (*l*). It was, however, only in respect of his lord that the vilein, at least in England, was without rights (*m*). He might inherit, purchase, sue in the courts of law, if his lord did not interfere, and when sued as a defendant in a real action or suit wherein land was claimed, he might shelter himself under the plea of villenage. If left executor, his lord could not take from him what belonged to the testator, but the vilein might have an action against him for the same, and might recover both the goods and damages, which would, however,

(*h*) Co. Lit. 116 *b*.

(*i*) "*Non potest aliquis*" (says Glanvil) "*in villenagio positus libertatem suam propriis denariis suis quærere, quia omnia catalla cujuslibet natiui intelliguntur esse in potestate domini sui.*" Lib. 5, cap. 5. The benevolence of lords, however, in many cases, allowed their vileins to acquire property (like the *peculium* of the Roman law), with which they purchased their enfranchisement. As to the *present* applicability of the maxim in the text, see *post*, p. 90.

(*k*) See Lit. sect. 172, *et seq.*, and Hargrave's famous argument in *Somersett's Case*, 20 How. St. Tr. 1.

(*l*) 3 Inst. 109.

(*m*) Lit. sec. 189.

of course be part of the testator's estate (*n*). And he seems to have been admissible as a witness in England in all cases, except as against his lord, though this point is rather obscure (*o*).

Such being the abject condition of the vilein, it is not to be wondered at, that as Christianity (*p*), civilization, and commerce advanced, villenage should have gradually become extinct. It is not, however, necessary here to follow it in the several stages of its decline, or to trace the causes which led to its ultimate extinction. It will be sufficient to mention, that the period of its final extinction in England (which was effected without any actual interposition of the Legislature) (*q*), is generally fixed

(*n*) Swinb. p. 2, sec. 9, § 15.

(*o*) See Hall. Mid. Ages, vol. i. ch. 2, p. 2.

(*p*) The doctrine that slavery was contrary to the principles of the Christian religion, is said to have been originally inculcated by Wycliff and his followers. Barr. on Stat. 280.

(*q*) See Barr. on Stat. 272—4. The case appears to have been otherwise in France, where Louis Hutin, in 1315, and Philip the Long, three years later, issued ordinances, declaring "that as all men were by Nature free born, and as their kingdom was called the kingdom of Franks, they determined that it should be so in reality as well as in name; therefore they appointed that enfranchisements should be granted throughout the whole kingdom upon just and reasonable conditions." See Roberts. Introd. to Hist. Chas. V., sects. 1 and 4, and note xx. *ib.* He cites Ordon, tom. 1, pp. 583, 653. Hallam, however, mentions as a fact not generally known, that predial servitude was not abolished in all parts of France till the Revolution, at the close of the last century. Mid. Ages, Ch. 2, p. 2, note, p. 150, 9th edit. The feudal law was abolished in France by a decree of the National Assembly, 4th August, 1789. See the *Baron de Bode's Case*, 8 Q. B. 246. It is remarkable, that till about the same period, or even later, there were in Scotland many colliers, coalbearers and salters in a state of slavery or bondage, bound to the collieries and salt works, where they worked, for life, and transferable with the collieries and salt works when their original masters had no further use for them. These men were not all free till an Act of Parliament was passed (39 Geo. 3, c. 56), declaring them to be so, for they appear to have neglected to avail themselves of an act which had been passed nearly a quarter of a century before (15 Geo. 3, c. 28), which enabled them to obtain their freedom, by going through certain forms. Well might the poet write—

> "Such dupes are men to custom, and so prone
> To rev'rence what is ancient, and can plead
> A course of long observance for its use,
> That even servitude, the worst of ills,
> Because delivered down from sire to son,
> Is kept and guarded as a sacred thing."
>
> COWP. *The Task*, B. 5.

In the Life of Hugh Miller, by Brown, 1858, it is said, p. 71, that "so late as 1842, when Parliament issued a Commission to inquire into the results of female labour in the coal pits of Scotland, there was a collier still living that had never been twenty miles from the metropolis; who could state to the Commissioners that his father, his grandfather, and himself were slaves, and that he had wrought for years in a pit in the neighbourhood of Musselburgh, where the majority of

about the latter end of Queen Elizabeth's reign, or soon after the accession of James I. (*r*).

As villenage gradually declined, the interposition of the Legislature appears to have become necessary for the regulation of labourers and servants, who seem to have been inclined to avail themselves of their freedom by remaining totally idle unless induced to work by high wages. But the first trace of any interposition on the part of the Government with a view of regulating the labour market is to be found in the Ordinance, Proclamation, or Statute, whichever it is, which is commonly called the Statute of Labourers, and which occurred 23 Edw. 3, A.D. 1349. In that year, when the plague, sometimes called "The Black Death," or "The Great Mortality," which is said to have destroyed one-third of the population of Europe (*s*), had extended its ravages to England, where it was equally destructive, so that servants and labourers of all sorts became excessively scarce, and demanded exorbitant wages (*t*), Edward III. (as Parliament was not sitting, having been prorogued on account of the plague) (*u*), by the assent of the Prelates, &c., and others

the miners were also serfs." And the author adds, p. 72, "The colliers carried in their faces the too certain index at once of their social and intellectual condition, being mostly of that type to which a very strong resemblance is found in the prints of savage tribes. The effect of the emancipation of these poor creatures has been, that in less than a quarter of a century this type of face has disappeared throughout Scotland."

(*r*) One of the last instances in which villenage was insisted on was *Crouch's Case*, which happened 10 & 11 Eliz., and is reported in Dyer, 266, pl. 11, and 282, pl. 32. Mr. Hargrave, however, in his argument in *Somersett's Case*, 20 How. St. Tr. 40, mentions several later cases — one so late as Hil. T., 15 Jac. 1, since which. he says, the claim of villenage has not been heard of in our courts of justice.

(*s*) Various accounts of this plague are collected in Barnes, Hist. Edw. 3, B. 2, Ch. 8, p. 428. See also Knighton, p. 2599. There is also an account of its ravages at Florence in the Introduction to the Decameron of Boccacio. He, too, speaks of the great "*scarsita di serventi*" in Florence caused by it. It is remarkable that so little notice of this plague is taken by most historians of England, who appear to be absorbed in the recital of the French wars of Edw. III. Froissart says but little of it in his Chronicles, vol. i. p. 200 (Johnes' edit.). Hume and Goldsmith scarcely mention it. Lingard speaks more fully of it in his Hist. Engl. vol. iv. p. 86. There is only a short account in Carte's Hist. Engl. vol. ii. p. 475.

(*t*) This effect of the plague was not confined to servants, for parish priests also, having become "very scant after the pestilence," an Act of Parliament was passed to regulate their wages, 36 Edw. 3, c. 8. See also 23 Edw. 3, c. 8, *ad fin.*

(*u*) Barnes, p. 437, says, "all suits and pleadings in the King's Bench and other places ceased, and all Sessions of Parliament for the space of more than two years were hindred."

of his Council, (*de quorum unanimi consilio duximus ordinandum quod*, &c.), issued an ordinance, writ, or proclamation, directed to the Sheriffs of the various Counties in England, with a view of compelling workmen and labourers to serve for reasonable wages. This ordinance recites that "because a great part of the people, and especially of workmen and servants, late died of the pestilence, many seeing the necessity of masters will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living;" and then proceeds to direct what wages shall be paid, and to make other regulations for the control of workmen and servants. It is printed at length in the Statutes at Large, as though it were an Act of Parliament, and is commonly referred to as "The Statute of Labourers" (*x*). But it would appear to be at least very doubtful, if it ever had the authority of an Act of Parliament. Moreover, its provisions appear to have been eluded by the ingenuity and avarice of the labourers. Knighton says, "*Operarii tamen adeo elati et contrariosi non advertebant regis mandatum, set si quis eos habere vellet, oportuit eum eis dare secundum suum velle, et aut fructus suos et segetes perdere, aut operariorum elatam et cupidam voluntatem ad vota implere.*" The King seems to have endeavoured to enforce his mandate, and enrich his own treasury, by fining the givers, and imprisoning the receivers, of exorbitant wages, though with little effect. For as soon as

The writs for the prorogation are set out at length in Rymer's Fœdera, vol. iii. part 1, and show the progress of the plague in England. See pp. 180, 182, 191. At p. 198 is a writ dated 18th June, 1350, 24 Edw. 3, directed to the Sheriff of Kent (and a note stating that *consimilia brevia diriguntur singulis vicecomitibus per Angliam*), *quia magna pars populi et maxime operariorum et servientum in ultimâ pestilentiâ defuncta est*, with a view of compelling such to work for reasonable wages. This last appears to be the same as what is commonly called The Statute of Labourers. At p. 210 there are two other writs directed to individuals in Suffolk and Lincolnshire, dated 12 and 18 Nov. 1350, from which it would appear that the former writs to the sheriffs had not been much regarded.

(*x*) Barrington on Stat. calls it a *supposed* statute, because the intervention of the Commons is not mentioned, and adds in a note that it appears from Dugdale that no Parliament was held 23 Edw. 3, because of the plague. Knighton, 2600, says, "*Interim rex misit in singulos comitatus regni quod messores et alii operarii non plus caperent quam capere solebant, sub pœna in statuto limitata, et ex hoc innovavit statutum.*" Barnes, p. 441, calls it a "King's Ordinance." See also 2 Ric. 2, c. 8. But 23 Edw. 3, appears to have been treated as a Statute, F. N. B. 167 B. See note to Co. Litt. 42 *b*. The point, however, is *now* more curious than important.

Parliament met after the plague had ceased, it was found necessary to pass an Act of Parliament having the same object, but of more extended operation. This act, 25 Edw. 3, stat. 1, is, it is conceived, more properly entitled to the appellation of the "Statute of Labourers." It recites the "said ordinance" of 23 Edw. 3, and that "the said servants having no regard to the said ordinance, but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said 20th year of Edw. 3, and before, to the great damage of the great men, and impoverishing of all the said Commonalty, whereof the said Commonalty prayeth remedy." It then proceeds to enact, in order "to refrain the malice of the said servants," various provisions more extensive than those contained in the ordinance of 23 Edw. 3. Among them is one, "That all workmen bring openly in their hands to the merchant towns their instruments, and there shall be hired in a common place and not privy." This regulation, which was probably intended to prevent secret contracts of hiring at exorbitant wages, but which was repealed 5 Eliz. c. 4, appears to be the origin of those "Statutes," or Fairs, for the hiring of servants still kept up in various parts of England, but which are now found to be productive of so much demoralization and harm to servants and labourers themselves, that great efforts are being made by clergymen and other philanthropic individuals to put them down.

Various statutes were also afterwards passed with a view to compel labourers and servants to work, and regulating their wages (*z*), diet (*a*), apparel (*b*), and games (*c*). And some to prevent people of small means making a great retinue of people, and giving them hats and other liveries (*d*),

(*z*) 25 Edw. 3, s. 1; 34 Edw. 3, c. 9, 10, 11; 2 Rich. 2, c. 8; 12 Rich. 2, c. 4; 4 Hen. 5, c. 4; 2 Hen. 6, c. 14; 6 Hen. 6, c. 3; 8 Hen. 6, c. 8; 23 Hen. 6, c. 13.

(*a*) 37 Edw. 3, c. 8. See 3 Inst. 201.

(*b*) 37 Edw. 3, c. 8, 9, 11, 14; 3 Edw. 4, c. 5; 22 Edw. 4, c. 1. These two, however, were not confined to servants, and they were repealed 24 Hen. 8, c. 13 and 1 Jac. 1, c. 25. See 3 Inst. 199.

(*c*) 12 Rich. 2, c. 6; 11 Hen. 4, c. 4 (see 17 Edw. 4, c. 3); 11 Hen. 7, c. 2; 33 Hen. 8, c. 9. See now 8 & 9 Vict. c. 109.

(*d*) 1 Rich. 2, c. 7; 20 Rich. 2, c. 1, 2; 1 Hen. 4, c. 7; 2 Hen. 4, c. 21; 7 Hen. 4, c. 14; 13 Hen. 4, c.

a custom which appears to have grown up, having for its object mutual maintenance in quarrels, and which was not confined to noblemen (*e*).

At the commencement of the reign of Queen Elizabeth, however, all former acts regulating wages were repealed, "chiefly for that the wages and allowances limited and rated in many of the said statutes were in divers places too small, and not answerable to that time respecting the advancement of prices of all things belonging to the said servants and labourers," and power was given to justices of the peace and magistrates of cities and burghs to rate wages and fix prices of work (*f*). Acts of Parliament conferring similar powers were also passed in Scotland (*g*), where their provisions were found so beneficial that they were afterwards extended to colliers (*h*). But so much of those acts as authorized and empowered justices of the peace and magistrates of cities and burghs to rate wages and fix prices of work for artificers, labourers, and craftsmen, has since been altogether repealed (*i*); and it is remarkable as showing the entire change of public opinion upon this subject, that in the act for the arbitration of disputes between masters and workmen, which was passed in 1824 (*k*),

3; 8 Hen. 6, c. 4; 8 Edw. 4, c. 2. In 12 Edw. 4, it was found necessary to pass an Act of Parliament for enabling the Prince of Wales to give liveries to other than menial servants, 12 Edw. 4, c. 4. These acts were repealed by 3 Car. 1, c. 4. Lord Coke (3 Inst. 200) says, "William of Malmesbury, comparing Englishmen and Normans together, saith, that in his time the English manner was to sit bibbing whole houres after dinner; and that the Norman fashion was to walk the streets with great troops with idle and loose serving men following them, both which were causes of many disorders and outrages."

(*e*) By the statute 34 & 35 Hen. 8, c. 1 (A. D. 1542—3), it was enacted, not only that the Bible should not be read in English in any church, but also that no women or artificers, prentices, journeymen, servingmen of the degree of yeomen or under, husbandmen, nor labourers should read the New Testament in English. This act, however, which was chiefly directed against Tindal's translation of the Bible, was repealed about four years afterwards, 1 Edw. 6, c. 12.

(*f*) 5 Eliz. c. 4. See this act, *post*, p. 371, and see 1 Jac. 1, c. 6, explaining it.

(*g*) 22 Parl. Jac. 6, c. 8; 1 Parl. Car. 1, c. 38.

(*h*) 39 Geo. 3, c. 56.

(*i*) 53 Geo. 3, c. 40. Several acts which had been passed in the reign of Geo. 3, for empowering justices to regulate the wages of persons employed in the manufacture of silk, were repealed 5 Geo. 4, c. 66; the provisions contained in them "having been found vexatious and injurious in their operation." The 29 Geo. 2, c. 33, s. 1, which empowered justices to make rates for the payment of wages to weavers and others employed in the woollen manufactures, was repealed 6 Geo. 4, c. 129.

(*k*) 5 Geo. 4, c. 96, *post*, p. 343.

there is a special provision, that nothing therein contained shall authorize justices, acting in execution of that act, to establish a rate of wages without the mutual consent of both master and workmen.

The statute of 5 Eliz. c. 4, only gave power to the magistrates "to *limit, rate, and appoint,*" wages, and gave no power to order payment of them. That power was, however, assumed by the magistrates, and their assumption of it was, by construction of law, held to be legal (*l*). But the statute being deficient, as it extended only to such wages as should be rated, and to servants in husbandry, and contained no power to admit the servant's oath in evidence; another act was passed in 20 Geo. 2 (*m*), giving more extensive powers to magistrates, and extending those powers to disputes between masters and various other descriptions of servants than those mentioned in the statute of Elizabeth. And this act has been found so beneficial in some respects, that although, as we have seen, repealed as to rating wages, several other acts have been subsequently passed extending the powers conferred by it in other respects (*n*).

The Statute Book also contains, in addition to the act relating to the arbitration of disputes between masters and workmen (*o*), an act consolidating the law relating to combinations amongst masters and workmen (*p*), and, also, an act relating to the payment of wages otherwise than in money, commonly called the Truck Act (*q*), which are applicable to most trades), a large number of statutes applicable to masters and servants in particular trades, which it is not thought necessary in this place to refer to at greater length, as they are not of general interest: the principal of those now in existence will be found in the Appendix.

Acts of Parliament have also been passed at various times for the regulation of the employment of children and young

(*l*) *Post*, p. 325, note (*a*).

(*m*) 20 Geo. 2, c. 19, *post*, p. 326.

(*n*) As to masters and workmen, see 27 Geo. 2, c. 6; 31 Geo. 2, c. 11, s. 2; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34; 10 Geo. 4, c. 52. See *post*, p. 325. As to masters and apprentices, see 32 Geo. 3, c. 57, s. 11; 33 Geo. 3, c. 55; 4 Geo. 4, c. 29; 4 Geo. 4, c. 34; 5 & 6 Vict. c. 7.

(*o*) 5 Geo. 4, c. 96, *post*, p. 342.

(*p*) 6 Geo. 4, c. 129, *post*, p. 342; 22 Vict. c. 34.

(*q*) 1 & 2 Will. 4, c. 37, App. p. 417.

persons in cotton and other factories, and for the preservation of their health and morals.

The first act for this purpose was passed in 1802 (*r*), and was amended in 1819 (*s*). Further enactments on the subject were made in 1825 (*t*), the provisions of which having been defeated for want of form, it was found necessary again to amend the law in 1829 (*u*). At the commencement of the reign of Will. 4, however, all these acts (except the first) were repealed, and other regulations enacted in lieu thereof (*x*). But a few years afterwards those regulations were in their turn also repealed, and another act passed, which (as amended by subsequent acts) now regulates the law upon the subject (*y*).

The provisions contained in these acts, which are applicable to young persons, (that is, persons above thirteen and under eighteen years of age (*z*),) were first extended to females above that age in 1844 (*a*). But as it is thought advisable to print these acts *in extenso* in the Appendix, it is not considered necessary to advert further to them in this place.

In 1851, an Act of Parliament was passed for the protection of apprentices and servants, which will be further adverted to hereafter (*b*), and which for the first time rendered it a misdemeanor for any master or mistress, legally bound to supply necessary food and clothing or lodging to an apprentice or servant, wilfully, and without lawful excuse, to refuse or neglect to provide the same.

By direction of the Statute Law Commissioners, who were appointed 23rd of August, 1854, a bill appears to have been prepared by Mr. Rogers, and laid before the Board on the 13th of December, 1854, for Consolidating the Statutes relating to masters and servants or workmen. This bill was originally prepared by Mr. Rogers, as a member of a former Board (appointed 23rd of July, 2 Will. 4), but was revised and com-

(*r*) 42 Geo. 3, c. 73, App. p. 408.
(*s*) 59 Geo. 3, c. 66; 60 Geo. 3, c. 5.
(*t*) 6 Geo. 4, c. 63.
(*u*) 10 Geo. 4, c. 51.
(*x*) 1 & 2 Will. 4, c. 39.
(*y*) 3 & 4 Will. 4, c. 103, amended by 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29 (see *Ryder* v. *Mills*, 3 Exc. 853); 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 38. See these acts in the Appendix.
(*z*) 7 & 8 Vict. c. 15, s. 73.
(*a*) 7 & 8 Vict. c. 15, s. 32, and see 13 & 14 Vict. c. 54.
(*b*) 14 & 15 Vict. c. 11. *post*, p. 130, and see the act in the Appendix, p. 529.

pleted by him for the Statute Law Commissioners (*c*). After being under their consideration for two years and upwards, it was ordered to be printed on February 11th, 1857; but it appears never to have been introduced into either House of Parliament, and nothing now appears likely to be done to effect the very desirable object (*d*) of Consolidating those Statutes.

(*c*) See their Report, 10 July, 1855.

(*d*) Let any one who doubts the desirability of it, read such cases as *Ex parte Baker*, 26 L. J., M. C. 155; *S. C.* 2 H. & N. 219; and Chap. VIII. and IX. of the following work.

ADDENDA ET CORRIGENDA.

Page 5, note (*l*). Add a reference to *Wright* v. *Chard*, 29 L. J., Ch. 82.

Page 6, note (*r*). Add "Where an infant can disaffirm and avoid a contract, he must do it within a reasonable time after coming of age, *Dublin and Wicklow Railway Company* v. *Black*, 8 Exch. 181."

Page 11, note (*y*). Add "See also 19 & 20 Vict. c. 97, s. 4."

Page 14, note (*t*). Add "See also *Green* v. *London General Omnibus Company*, 29 L. J., C. P. 13, where it was held that a trading corporation was liable for a wilful act done by their servants, if done within the purposes of the incorporation."

Page 45, line 9 from bottom. Add "nor are they entitled *de jure* to a reasonable time allowed them for the removal of their furniture, &c. But if they go on simply for that purpose and do not remain an unreasonable time, or exclude their master, they could perhaps not be treated as trespassers, *Doe* v. *M'Kaeg*, 10 B. & C. 721."

Page 52, note (*k*). Where a domestic or menial servant, such as a cook, is discharged with a month's wages, in lieu of notice, she is *not* entitled to *board wages* for the month, but only to a month's wages in addition to the amount due to the time of discharge, *Gordon* v. *Potter*, 1 Fost. & F. 644; Hill, J., at *nisi prius*.

Page 100, note (*x*). *Thompson* v. *Ross*, is reported also in 29 L. J., Exch. 1.

,, note (*y*). Add a reference to *Manley* v. *Field*, 29 L. J., C. P. 79.

Page 101, line 20 from top. Add "except by consent of the parties, 19 & 20 Vict. c. 108, s. 23."

Page 106, note (*h*). Add "See also *Daugars* v. *Rivaz*, M. R. Jan. 24, 1860."

Page 108, note (*r*). Add, "In *Crocker* v. *Molyneux*, 3 C. & P. 470, it was held, that a servant who was hired at thirty guineas a year, and a suit of clothes, and was provided with a livery, but was dismissed without sufficient cause before the end of the year, could not maintain trover for the livery against his mistress, the property in it being in his mistress, who provided it, and that his remedy was an action for not being allowed to serve to the end of the year, and so to become entitled to the livery."

Page 119, line 2 from bottom—327, note (*m*). Add "But where a discharged servant has brought an action in the County Court for wrongful discharge, and been defeated, he cannot afterwards take proceedings for recovery of wages before a magistrate, *Routledge* v. *Hislop*, 29 L. J., M. C. 90."

Page 140, note (*d*). See also *Abraham* v. *Reynolds*, 1 Law Times, N. S. 330; and *Potter* v. *Faulkner*, Q. B. Feb. 14, 1860, in which last case doubts were thrown upon the authority of the case of *Degg* v. *Midland Railway Company*.

Page 157, note (*r*). Add, after *Foster* v. *Smith*, a reference to *Ramazotti* v. *Bowring*, 29 L. J., C. P. 30.

Page 303, note (*a*). In *R.* v. *Hoare*, 1 Fost. & F. 647, it was held by Wightman, J., after consulting Pollock, C. B., that a person who had *formerly been* a servant, and was employed to collect debts without remuneration, and who, under the circumstances, was *not a servant*, could not be indicted under 20 & 21 Vict. c. 54, s. 4, as a bailee; as a person who received money on behalf of another did not thereby become a bailee of the money, not being bound to hand over the particular sum which he had received.

A TREATISE

ON

The Law of Master and Servant.

CHAPTER I.

THE PARTIES TO THE CONTRACT.—WHO MAY CONTRACT THE RELATIONSHIP OF MASTER AND SERVANT.

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GENERALLY.

Parties to the contract generally.

As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a servant. But in order that a contract of hiring and service may be legally binding (*a*), it is necessary, that at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter: in other words, he must be *sui juris*.

Servant must be *sui juris*, in order to enter into binding contract of hiring and service.

As in cases of settlement by hiring and service.

Thus, whilst a settlement could be gained by hiring and service (*b*), it was held that the party who hired himself as a servant must, in order to acquire a settlement by service under that hiring, have been, at the time of hiring, disencumbered from any other relation which might interfere with or defeat

(*a*) It is not always necessary to prove a *legally binding contract* of hiring: a service *de facto* is, as we shall hereafter see, sufficient for many purposes. Even in an action for disturbance of a freehold office, it is not necessary to show an appointment by deed, proof of having acted in the office for several years is sufficient. *M'Mahon* v. *Lennard*, 6 Ho. Lords Cas. 970, et cas. cit. *ib.* 984.

(*b*) By statute 4 & 5 Will. 4, c. 76, s. 64, no settlement can be gained by hiring and service, or by residence under the same, since 14 August, 1834.

the performance of his engagement; for, unless he were so, he was not free to contract, and, if not free to contract, he could not be lawfully hired.

Contracts of hiring by apprentices.

Therefore an apprentice (*c*) could not, whilst his indentures remained in force, (and they were not then dissolved by the bankruptcy (*d*) of the master,) lawfully hire himself to another master so as to gain a settlement by service under such hiring.

Soldiers.

So a deserter from the king's marine forces (*e*); and an invalided soldier in the king's service, who had leave of absence upon agreeing to relinquish his pay for the time, which leave was renewed from time to time; were also held incapable of making a valid contract of hiring and service, so as to gain a settlement thereunder, since they were not *sui juris* so as to be able to contract, being under a legal disability in consequence of having entered into a different obligation (*f*).

Militiamen and others.

And similar principles were held to be applicable to militiamen and their substitutes, and members of volunteer corps, such persons being held to be incapable of entering into a valid contract of hiring and service; unless, at the time they did so, they informed their master, or he knew of their liability to be called on to serve, and agreed, in such case, to dispense with their personal services (*g*).

Purser's steward, who is servant of Crown, cannot sue purser.

Upon similar principles it has been held (*h*), that a purser's steward, on board one of her Majesty's ships, who could not be appointed by the purser without the assent of the commander, and *was entitled to the pay* of an able seaman *from the Crown*, could not recover additional wages from the purser, although it was proved to be usual for pursers to allow their stewards a salary at the rate of 1*l.* per gun.

But cook hired from another vessel, on promise of extra pay, can sue.

But where (*i*) the commander of one of her Majesty's ships engaged the plaintiff, who was then cook on board a steamer, to serve in that capacity on board the ship he commanded, promising to give him 12*l.* a year beyond his rating as an able seaman; it was held that the plaintiff might recover that amount in an action against the commander, Maule, J., observing, "Here the plaintiff, instead of contracting to do work which he was already bound to perform, was a free agent, perfectly *sui juris*, when he entered into the engagement."

(*c*) *R.* v. *Hindringham*, 6 T. R. 557. And see *R.* v. *Stowmarket*, 9 East, 211; *R.* v. *Dunton*, 15 East, 352, which, although not cases of apprenticeship, illustrate the text.

(*d*) *R.* v. *Puckington*, 1 Str. 582; and see *Thomas* v. *Williams*, 1 A. & E. 485. Bankruptcy of the master does now enure as a complete discharge of an indenture of apprenticeship, 12 & 13 Vict. c. 106, s. 170; and see *ib.* as to return of apprentice fee.

(*e*) *R.* v. *Norton*, 9 East, 206.

(*f*) *R.* v. *Beaulieu*, 3 M. & S. 229.

(*g*) *R.* v. *Westerleigh*, Burr. 753; *R.* v. *Winchcombe*, 1 Doug. 391; *R.* v. *Holsworthy*, 6 B. & C. 283; *R.* v. *Taunton St. James*, 9 B. & C. 831; *R.* v. *Elmley Castle*, 3 B. & Ad. 826; *R.* v. *St. Mary-at-the-Walls, Colchester*, 5 B. & Ad. 1023; *R.* v. *Witnesham*, 2 A. & E. 648.

(*h*) *Carter* v. *Hall*, 2 Stark. 361.

(*i*) *Clutterbuck* v. *Coffin*, 3 M. & G. 842; and see *Harris* v. *Carter*, 3 E. & B. 559; *Hartley* v. *Ponsonby*, 26 L. J., Q. B. 322.

For all ministerial acts, which require no exercise of judgment or discretion, every public officer may appoint a deputy or servant (*k*). Thus a sheriff, or churchwarden, or overseer may depute the execution of warrants to others. But an officer whose duties are of a judicial character cannot act by deputy (*l*), unless empowered to do so by Act of Parliament.

Ministerial public officer may appoint a deputy.

Judge cannot.

MARRIED WOMEN.

A married woman is, in general, incapable of entering into any contract which will be binding upon her at law, and cannot, therefore, take an apprentice, as she cannot legally bind herself to instruct him (*m*). And she cannot sue alone on a contract made with her before or after marriage, even though her husband is an alien enemy (*n*). In entering into contracts she is generally regarded as the agent of her husband, and he will, in general, be bound by such contracts. When, therefore, a married woman hires servants, her husband will, in most cases, be liable to pay the wages. And it makes no difference in his liability that the wife has entered into and signed an agreement under seal where he has not authorized her to do so.

Married women.

Liability of husband.

In a case (*o*), therefore, where the defendant's wife, by an agreement under seal to which he was no party, and which he had not given her any *written* authority to enter into, agreed to take the plaintiff with her to Barbadoes in the capacity of a waiting-maid, to pay her 21*l.* per annum as long as she continued in her service, and to pay for her passage to Barbadoes, and other incidental expenses; as also her passage home to England in case she should be dismissed from her situation; it was held that the *defendant* was liable to an action of *assumpsit* for the amount of the plaintiff's wages and her passage-money home to England, which had not been paid, although it was objected, on the part of the defendant, that the form of action was misconceived, and that it should have been on the deed.

White v. *Cuyler.*

The liability of the husband, however, upon contracts of hiring entered into by the wife, depends entirely upon the principle that the wife was his agent and had authority from him to enter into the contract (*p*). But it is not necessary, in order to render him liable, to show that such authority was *expressly* given to the wife. It is sufficient if it can be *implied* from circumstances. In all cases the question whether or not she had authority to bind him is one proper for the consideration of a

Husband's liability depends on wife's agency.

(*k*) *Phelps* v. *Winchcombe*, 3 Bulstr. 77; *Walsh* v. *Southworth*, 6 Exc. 150; *S. C.* 2 L. M. & P. 91.

(*l*) Roll. Abr. 591, tit. "Deputie."

(*m*) *R.* v. *Guildford*, 2 Ch. 284. As to how far a married woman may act as a *feme sole* in the City of London, see *Beard* v. *Webb*, 2 Bos. & P. 93.

(*n*) *De Wahl* v. *Braune*, 1 H. & N. 178.

(*o*) *White* v. *Cuyler*, 1 Esp. 200; *S. C.* 6 T. R. 176.

(*p*) *Manby* v. *Scott*, *Montague* v. *Benedict*, *Seaton* v. *Benedict*, 2 Smith's L. C. 245; *Mizen* v. *Pick*, 3 M. & W. 481; Chit. on Contr. 152; *Reid* v. *Teakle*, 13 C. B. 627; *Ruddock* v. *Marsh*, 1 H. & N. 601; *Johnson* v. *Sumner*, 3 H. & N. 261; *S. C.* 27 L. J., Exc. 341.

The presumption of which

jury (*q*); and, so long as husband and wife cohabit, it will be presumed that she had authority to hire such servants as were necessary or suitable to the condition in life of her husband, and he will be liable to pay their wages (*r*). When they do *not* cohabit the presumption is rather the other way, viz., *against* the husband's liability upon his wife's contracts (*s*). But in both cases the presumption may be rebutted: in the former case, by evidence that the husband had expressly forbidden his wife to hire the servant, and the servant knew that he had done so (*t*); or by showing that, during his temporary absence, he allowed and paid his wife an adequate sum for the payment of all necessary expenses, and that the servant knew that he did so (*u*): in the latter case, by showing that the wife was not reasonably provided for, considering the circumstances of the husband (*x*). For if, when husband and wife are separated, she receive, either from her husband or any other source (*y*), an adequate sum for her separate maintenance, she has no implied authority to pledge her husband's credit, and in such case it is not necessary to prove that the party trusting the wife had notice of her separate maintenance in order to exempt the husband from liability (*z*). But when a married woman is separated from her husband, she does not thereby regain the capacity to enter into contracts which will be binding upon her as a *feme sole*, even though the separation be by deed, and therefore, although, in some such cases, the husband is not liable, yet no more is she; parties entering into contracts with her, under such circumstances, trust to her honour (*a*).

may be rebutted.

Power of husband to take advantage of wife's contracts of hiring.

So, on the other hand, the husband may take advantage of any contract of service entered into by his wife; and therefore, where a married woman enters into service her husband is the person to whom her wages should be paid, as he is entitled to the profits resulting from her work and labour, and she cannot, in general, even join him in an action upon a contract made during the marriage for her work and labour (*b*), though it is

(*q*) *Lane* v. *Ironmonger*, 13 M. & W. 368.

(*r*) See *Etherington* v. *Parrott*, 1 Salk. 118; *Jewsbury* v. *Newbold*, 26 L. J., Exc. 247; and cas. cit. 2 Smith's L. C. 283. This presumption of agency arising from cohabitation is not confined to the case of a lawful wife; it extends to the case of a woman with whom the defendant cohabits, and whom he allows to assume his name, although not his wife, *Watson* v. *Threlkeld*, 2 Esp. 637.

(*s*) *Reed* v. *Moore*, 5 C. & P. 200; *Ozard* v. *Darnford*, 1 S. N. P. 294; *Mainwaring* v. *Leslie*, M. & M. 18; *Clifford* v. *Laton*, M. & M. 101.

(*t*) *Etherington* v. *Parrott*, *ubi supra*.

(*u*) *Holt* v. *Brien*, 4 B. & Ald. 252.

(*x*) *Clifford* v. *Laton*, M. & M. 101.

(*y*) *Ibid.* But a pension revocable at pleasure is not a sufficiently stable fund for the purpose, *Thompson* v. *Hervey*, 4 Burr. 2177.

(*z*) *Mizen* v. *Pick*, 3 M. & W. 481; *Holder* v. *Cope*, 2 C. & K. 437; *Reeve* v. *Marquis of Conyngham*, 2 C. & K. 444.

(*a*) *Marshall* v. *Rutton*, 8 T. R. 545.

(*b*) *Buckley* v. *Collier*, 1 Salk. 114. And see *Cooper* v. *Wellington*, 7 C. & P. 531, which was an action brought by a husband alone, who was separated from

said she may do so where she is the meritorious cause of action, as where the cause arises from her personal labour and skill (*c*).

Payment to wife when an answer to action by husband for her wages.

And an admission by the wife that her wages have been paid would not be evidence against the husband in an action by him for her wages (*d*). Nor, indeed, would the fact of actual payment to the wife be any answer to such an action, unless she was authorized by him to receive it (*e*).

Harper v. *Luffkin.*

There is, however, one case (*f*) in which it was held that a married woman, who was residing with her father, having been seduced, the father might bring an action against her seducer, although it was objected that the action was founded on loss of service; and the daughter being a married woman, she could not enter into a valid contract of service, and therefore the father was not legally entitled to her services; but it was held that a service in fact was sufficient to support the action, especially as the husband had not interfered.

Where husband convicted.

Where the husband is civilly dead, as in case of his being transported for life, or a limited term, the wife may contract as a *feme sole*, and sue or be sued upon her contracts (*g*); and it makes no difference in this respect that he is at the hulks in this country and not actually sent abroad (*h*).

Power of married woman in Equity.

In *equity* a married woman having separate property is, for many purposes, regarded as a *feme sole*, and her contracts (*i*) are held to bind her separate estate, though she is incapable at *law* of making a contract in respect of her separate property (*k*). And it appears to be the better opinion, that it is not necessary that a contract should be in writing, in order to bind her separate estate in equity, where that is not rendered necessary by any statute (*l*); nor, where it is in writing, is it necessary that it should refer to the separate property in order to bind it (*m*). Where, however, there is a restraint upon her power of anticipation, she cannot deal with her property as a *feme sole*. And a married woman is not rendered competent to contract as a *feme sole*, by the possibility that she may afterwards acquire separate property (*n*).

his wife, for special damage sustained by him in consequence of a libel on his wife, whereby she lost a situation which enabled her to maintain herself.

(*c*) *Brashford* v. *Buckingham*, Cro. Jac. 77, 205; and see *Nurse* v. *Wells*, 4 B. & Ad. 743; *S. C.* in error, 1 A. & E. 65; *Johnson* v. *Lucas*, 1 E. & B. 659; Selw. Nisi Prius, tit. "Baron and Feme," III.

(*d*) *Hall* v. *Hill*, 2 Str. 1094.

(*e*) *Offley* v. *Clay*, 2 M. & G. 172.

(*f*) *Harper* v. *Luffkin*, 7 B. & C. 387.

(*g*) Chit. on Contr. 169.

(*h*) *Ex parte Franks*, 7 Bing. 762.

(*i*) *Bell* v. *Hyde*, Prec. Cha. 328; *Norton* v. *Turvill*, 2 P. Wms. 144; *Grigby* v. *Cox*, 1 Ves. 517.

(*k*) *Clerk* v. *Laurie*, 1 H. & N. 452.

(*l*) *Owens* v. *Dickinson*, Cr. & Ph. 55.

(*m*) *Ibid.*, and see *Vaughan* v. *Walker*, 6 Ir. Ch. Rep. 471.

(*n*) *Per* Wood, V. C., in *Walrond* v. *Walrond*, 28 L. J., Ch. 97.

Where wife deserted by husband has obtained order for protection.

And now (*o*) where a wife is deserted (*p*) by her husband she may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country to justices in petty sessions; or, in either case, to the Court for Divorce and Matrimonial Causes, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him: and such earnings and property shall belong to the wife as if she were a *feme sole:* Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the registrar of the county court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the court or to the magistrate or justices by whom such order was made for the discharge thereof: Provided also, that if the husband, or any creditor of, or person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is thereby empowered to bring) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made the wife shall, during the continuance thereof be and be deemed to have been during such desertion of her in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation.

INFANTS.

Infants.

Although infants labour under a general incapacity to enter into *absolutely* binding contracts with other persons (*q*), yet they may make some contracts which will be binding upon them until avoided by them (*r*); such as contracts for their

(*o*) 20 & 21 Vict. c. 85, s. 21. The affidavit in support of the application for such an order should be very precise, to satisfy the court of the fact of desertion. *Ex parte Sewell*, 28 L. J., Prob. & Mat. C. 8. On the construction of this section generally, see *Bathe* v. *Bank of England*, 27 L. J., Ch. 630.

(*p*) As to what amounts to desertion, see *Thompson* v. *Thompson*, 27 L. J., Prob. & Mat. C. 65.

(*q*) Bac. Abr. tit. "Infancy," I.

(*r*) Third persons cannot avoid contracts entered into by infants, on the ground that they are not for the infant's benefit, *Douglas* v. *Watson*, 17 C. B. 685.

benefit (*s*). Infants may also make contracts for necessaries, which will be absolutely binding upon them (*t*).

What are necessaries is a mixed question of law and fact (*u*), and will be decided by the court and jury taking into consideration the station in life of the infant (*x*). What are necessaries.

Livery for the servants of an infant, who was a captain in the army, has been held to come within the description of necessaries, and the infant was held liable to pay for it (*y*). Similar principles would apply to a claim for wages. Livery for servants of captain in the army.

A contract of apprenticeship is generally to be regarded as for the benefit of an infant, and, therefore, he may make a legal binding contract of apprenticeship (*z*). If he could not do so, he could not be bound at all, for a father has no common law authority to bind his infant son an apprentice without his consent (*a*). Contracts beneficial to infant. Contract of apprenticeship.

So a contract of hiring and service may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father (*b*) or mother (*c*). Such a contract would subject him to the statutable regulations applicable to masters and servants, although he might not be liable to any action upon the contract (*d*). And it would give him a right of action for wages earned (*e*). For if an infant of Contracts of hiring and service.

(*s*) *Maddon* v. *White*, 2 T. R. 161; *R.* v. *Shinfield*, 14 East, 541.

(*t*) Bac. Abr. tit. "Infancy," I. 1; and see *Zouch* v. *Parsons*, 3 Burr. 1801; *Drury* v. *Drury*, 5 Bro. Parl. Cas. 570.

(*u*) *Wharton* v. *M'Kenzie*, 5 Q. B. 612.

(*x*) *Peters* v. *Fleming*, 6 M. & W. 46; *Wharton* v. *M'Kenzie*, *ubi supra*; *Chapple* v. *Cooper*, 13 M. & W. 252.

(*y*) *Hands* v. *Slaney*, 8 T. R. 578; *Chapple* v. *Cooper*, 13 M. & W. 258.

(*z*) *R.* v. *St. Petrox*, 4 T. R. 196; *R.* v. *Arundel*, 5 M. & S. 257. In order to make it binding, however, he must execute the contract (as an adult must also, *R.* v. *Ripon*, 9 East, 295). It is not sufficient for the father and master to execute, *R.* v. *Cromford*, 8 East, 25; *R.* v. *Arnesby*, 3 B. & Ald. 584. But he may execute by the hand of a third party, *R.* v. *Longnor*, 4 B. & Ad. 647.

(*a*) *R.* v. *Arnesby*, 3 B. & Ald. 584. The reason why the father or friend generally joins in a contract of apprenticeship, is because an action of covenant will not lie against an infant apprentice for not serving; see Y. B., 21 Hen. 6, 31; *Gilbert* v. *Fletcher*, Cro. Car. 179; and see *Capes* v. *Hutton*, 2 Russ. 357. Though it appears to be otherwise by the custom of London, *Horn* v. *Chandler*, 1 Mod. 271; and see *Ex parte Eden*, 2 M. & S. 226; Com. Dig. Justices of the Peace, B. 55; *Beard* v. *Webb*, 2 B. & P. 99. Any action for breach of the contract on the part of the infant should be against the father where he joins, *Branch* v. *Ewington*, 2 Doug. 518. To such an action it is no answer that it was the master's duty to compel service, *Hughes* v. *Humphreys*, 6 B. & C. 687. Nor that the son avoided the indenture after he came of age, *Cuming* v. *Hill*, 3 B. & Ald. 59; see also *Ellen* v. *Topp*, 6 Exc. 424; *Phillips* v. *Clift*, 4 H. & N. 168.

(*b*) *R.* v. *Chillesford*, 4 B. & C. 94.

(*c*) *Gilbert* v. *Schwenck*, 14 M. & W. 488.

(*d*) *R.* v. *Chillesford*, *ubi supra*; and see *Wood* v. *Fenwick*, 10 M. & W. 204.

(*e*) *Ibid.* In America a minor cannot sue for wages unless his

five years of age, or other person who is *non potens in corpore*, be retained and serve in the best manner he can, his master must pay him his wages (*f*).

Infants may sue for wages in County Court;

By the County Courts Act it is provided (*g*), "that it shall be lawful for any person under the age of twenty-one years to prosecute any suit in any court holden under that act for any sum of money, not greater than fifty pounds, which may be due to him for wages, or piecework, or for work as a servant, in the same manner as if he were of full age."

and in Sheriffs' Court.

And there is a similar provision in the City of London Small Debts Act (*h*).

Wood v. *Fenwick.*

A contract of hiring and service for wages would be considered beneficial to, and binding upon, an infant, although it contain clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages (*i*).

R. v. *Lord.*

But it has been held, that a contract by an infant binding himself to serve during a certain time for wages, but enabling the master to stop the work whenever he chose, and retain the wages during the stoppage, is wholly void, as not being beneficial to the infant (*k*).

Statutes for protection and control of women and children.

Women and children, however, being considered to require legislative protection and control whilst entering into contracts of hiring and service, various Acts of Parliament have, at different times, been passed for this purpose, which are referred to in the note (*l*), and some of which will be found printed at length in the Appendix.

father has given him his time, or emancipated him, *Stiles* v. *Granville*, 6 Cush. Rep. 458. But where the father was dead and the mother was insane, a minor was regarded as emancipated, and allowed to recover, *Jenness* v. *Emerson*, 15 New Hampsh. Rep. 486.

(*f*) Dalt. Just. Ch. 58; Bro. tit. "Labour," 46; Bac. Abr. tit. "Master and Servant;" and see *Phillips* v. *Jones*, 1 A. & E. 333.

(*g*) 9 & 10 Vict. c. 95, s. 64; 13 & 14 Vict. c. 61, s. 1.

(*h*) 15 & 16 Vict. c. lxxvii. s. 46. In the Customs Regulation Act, there is also a provision that bonds given under that act by minors shall be valid, 16 & 17 Vict. c. 107, s. 195.

(*i*) *Wood* v. *Fenwick*, 10 M. & W. 195.

(*k*) *R.* v. *Lord*, 12 Q. B. 757.

(*l*) See as to Parish Apprentices, 43 Eliz. c. 2, s. 5; 42 Geo. 3, c. 46; 56 Geo. 3, c. 139; 3 & 4 Will. 4, c. 63; 4 & 5 Will. 4, c. 76, ss. 15, 61; 7 & 8 Vict. c. 101, s. 12; as to Boys entering H.M.'s Navy, 16 & 17 Vict. c. 69; as to Apprentices to Sea Service, 17 & 18 Vict. c. 104, s. 141, *et seq.*; 14 & 15 Vict. c. 35, s. 10 (the rest of that act being repealed); as to Apprentices to Watermen, &c., on the Thames, 22 & 23 Vict. c. cxxxiii. s. 48, *et seq.*; as to Chimney Sweeps, 3 & 4 Vict. c. 85 (see *R.* v. *Hipswell*, 8 B. & C. 466); as to Employment of Women and Children in Mines and Collieries, 5 & 6 Vict. c. 99 (in Appendix); in Factories, 3 & 4 Will. 4, c. 103; 4 & 5 Will. 4, c. 1; 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29 (see *Ryder* v. *Mills*, 3 Exc. 853); 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 38 (in Appendix); in Print Works, 8 & 9 Vict. c. 29; 10 & 11 Vict. c. 70 (in Appendix); and see the General Act for the better Protection of Apprentices and Servants, 14 & 15 Vict. c. 11 (in Appendix).

LUNATICS.

Lunatics.

The position of a lunatic or person of unsound mind is considered in general to bear some analogy to that of an infant in regard to his liability upon contracts (*m*). For although, strictly speaking, a person of unsound mind is incompetent to contract (*n*), yet there can be no doubt that a lunatic would be held liable to pay for any services which *had been* rendered to him, provided they were such as might reasonably be considered *necessary* for a person in his station in life. In such a case the law would imply a promise to pay for them (*o*). And modern cases show that when a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to an action on the contract, especially in a case where the contract was not merely executory, but executed in the whole or in part, and the parties could not be restored altogether to their original position (*p*).

PARTNERS.

Partners generally.

Every partner may in general be regarded as the agent of the partnership firm, and as such endowed with authority to do all acts within the scope of the partnership business, so as to bind the firm. A partner, indeed, virtually embraces the character of both principal and agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal, and so far as he acts for his partners he may as properly be deemed an agent (*q*).

Power of hiring and dismissing servants.

With regard to hiring and dismissing clerks and servants, each partner would, generally speaking, have authority to hire and discharge such servants as might be necessary for the purpose of carrying on the business of the partnership.

Donaldson v. *Williams.*

Where, therefore, one partner gave a weekly servant due notice to quit, but the other partner afterwards authorized him to remain in the house where the partnership business was carried on, and of which the partners were joint tenants, it was held that such remaining was lawful, and that the partner who gave the notice to quit was not justified in turning the servant out by force on his refusing to go peaceably, as the rights of the partners were co-extensive (*r*).

(*m*) *Wentworth* v. *Tubb*, 1 Y. & C. N. C. 171.

(*n*) See Ch. on Contr. 129, *et seq.* The maxim of the Roman law was—"*Furiosus nullum negotium gerere potest, quia non intelligit quod agit.*" Inst. lib. 3, tit. 20, s. 8.

(*o*) See *Baxter* v. *Earl Portsmouth*, 5 B. & C. 170.

(*p*) *Molton* v. *Camroux*, 2 Exc. 487; *S. C.* in Cam. Scacc., 4 Exc. 17; *Read* v. *Legard*, 6 Exc. 636; *Beavan* v. *M'Donnell*, 9 Exc. 309.

(*q*) Story on Partn. 1; *Ernest* v. *Nicholls*, 6 Ho. Lords Cases, 417.

(*r*) *Donaldson* v. *Williams*, 1 Cr. & M. 345; see also *Read* v. *Coker*, 13 C. B. 850; where two partners quarrelled, and one, with the aid of his servants, turned the other out.

Atwood v. *Ernest.*

And where the purser of a mine, who was also one of the adventurers, in pursuance of a resolution of shareholders, deposited the account-books of the mine with an accountant to examine the accounts, it was held that the purser could not *alone* bring an action for the recovery of the books which the accountant detained by the license, as he alleged, of the other adventurers (*s*).

Effect of dissolution of partnership or change of firm on contracts of hiring; *Hobson* v. *Cowley.*

Whether or not a dissolution of partnership would be a breach of a contract by a firm to retain a person in their service for a lengthened period at an increasing salary may be doubted (*t*); but a dismissal by one of the remaining partners would clearly be so. And where a person entered into the service of a firm as manager for seven years at a salary increasing every year up to 190*l.* per annum, but shortly afterwards, upon a change in the firm, signed a memorandum, "In consideration that a new agreement is entered into with the new firm at a salary of 180*l.* a year, I am willing to cancel the present agreement with C. and M." (the old firm), and afterwards continued in the service of the new firm from August to April, at a salary of 180*l.* a year, and the jury found that there was a new agreement with the new firm, it was held, in an action against C. and M. for wrongful dismissal, that the new agreement was an implied surrender of the first, and was good evidence in support of a plea of exoneration before breach (*u*).

Dobbin v. *Foster.*

A., B. and C., were partners in trade, and in July, 1838, by an agreement in writing, engaged to employ the plaintiff, and he to serve them as their foreman for twelve years at two guineas a week, with perquisites. In 1843, the firm got into difficulties, and the concern was closed. A fiat in bankruptcy was sued out against them, and notice was given to the plaintiff by the assignees not to come again upon the premises. In November, 1838, C. had retired from the firm, and the business was carried on by A. and B., and the plaintiff had continued to serve them. The plaintiff sued A., B. and C., upon the original agreement, which, on their behalf, was contended to have been rescinded, but Coltman, J., held the defence not to be made out, and said, "C.'s going out of the concern did not *per se* put an end to the agreement; and as by that agreement the plaintiff had engaged to serve for a certain period, it appears to me that he was bound to continue in the service of A. and B., and that therefore it cannot be implied from this circumstance that the original contract was rescinded" (*x*).

on fidelity bonds.

It may be convenient to mention in this place that where bonds are given by sureties to partners, for the fidelity and good conduct of clerks and other officers and agents in the service of a partnership, the uniform rule of construction of the bond,

(*s*) *Atwood* v. *Ernest*, 12 C. B. 881.

(*t*) See *Lloyd* v. *Blackburn*, 9 M. & W. 363, where the question arose on dissolution of partnership between masters of an apprentice; and *Popham* v. *Jones*, 13 C. B. 225, where *A.* was bound apprentice to two masters not in partnership.

(*u*) *Hobson* v. *Cowley*, 27 L. J., Exc. 205; and see *Robson* v. *Drummond*, 2 B. & Ad. 303.

(*x*) *Dobbin* v. *Foster*, 1 C. & K. 323.

unless some clear language to the contrary is inserted, is, that the bond does not apply as a security after any change of the members of the firm by death or otherwise (*y*), or after any alteration of the servant's salary (*z*). But language may of course be used in a bond which shall clearly import a continuing liability, notwithstanding any change of firm or salary; and if such language is used, there can be no question that it will, both at law and in equity, have the most complete operation (*a*). Alteration of firm, Salary, or duties.

And it may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. Even if the sureties were consenting parties by parol to such a change, it could hardly affect their liability under the bond. The question is whether the nature and functions of the office or employment are changed, for if they are, it is not the same office within the meaning of the bond (*b*). avoids bond.

CORPORATIONS.

Contracts in general, in order to be binding upon a corporation, must be under the common seal of the corporate body (*c*). This rule is to be found in all the authorities (*d*), beginning with those collected from the *Year Books*, in *Brookes's Abridgment*, tit. "*Corporations and Capacities*," down to the latest of the present day, the ground of the rule being, that as a corporation is a body politic and invisible, it can only act and speak by its common seal; or as it is said *arguendo* in *Reg.* v. *Bigg* (*e*), "the common seal is the hand and mouth of the corporation." Corporations.

Accordingly no municipal corporation (except London (*f*)), can appoint an attorney, except under the corporate seal. Attorney to a corporation must be appointed by deed.

(*y*) Story on Partn. 350; *Wright* v. *Russel*, 2 W. Bl. 934; *Lord Arlington* v. *Merrick*, 2 Wms. Saund. 411, and notes; *Mayor of Berwick* v. *Oswald*, 1 E. & B. 295; 3 E. & B. 653; 5 Ho. Lords Cas. 856; *Kitson* v. *Julian*, 4 E. & B. 854.

(*z*) *North Western Railway Company* v. *Whinray*, 10 Exc. 77.

(*a*) *Strange* v. *Lee*, 3 East, 484; *Metcalf* v. *Bruin*, 12 East, 400; *Pease* v. *Hirst*, 10 B. & C. 122; *Dry* v. *Davy*, 10 A. & E. 30; *Simpson* v. *Cooke*, 1 Bing. 452; *Frith* v. *Rotherham*, 16 M. & W. 39; *Pybus* v. *Gibb*, 6 E. & B. 902; *Mayor of Dartmouth* v. *Silly*, 7 E. & B. 97.

(*b*) *Pybus* v. *Gibb*, 6 E. & B. 902; *Bonar* v. *Macdonald*, 3 Ho. Lords Cas. 226.

(*c*) Bac. Abr. "Corporations," E. 3; Com. Dig. "Franchise," F. 13. In *The Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815, it is shown that the doctrine is not, as it might appear, a mere relic of ignorant times. And see *Diggle* v. *The London and Blackwall Railway Company*, 5 Exc. 451.

(*d*) See *Gibson* v. *East India Company*, 5 Bing. N. C. 269.

(*e*) 3 P. Wms. 423.

(*f*) In London the appointment is matter of *record;* see *The Mayor of Thetford's case*, 1 Salk. 192; 3 Salk. 103; 2 Lord Raym. 848; Holt, 171.

Arnold v. *Mayor of Poole.*

And, therefore, where (*g*) an attorney, who was town clerk and clerk of the peace, received instructions from the mayor and other members of the town council to take all necessary steps to oppose certain measures in Parliament, and to conduct certain suits in Chancery relating to the borough, but no authority was given to him under the seal of the corporation, it was held, that he could not sustain an action against the corporation for his costs.

Reg. v. *Mayor of Stamford.*

So where (*h*) a person, who, previously to the passing of the statute 5 & 6 Will. 4, c. 76, had held the offices of town clerk and clerk of the peace, and also clerk to the justices, was, after the passing of that statute, re-appointed to the offices of town clerk and clerk of the peace at an increased salary, by a resolution passed at a meeting, and entered upon the minutes of the town council; but there was no agreement under the seal of the corporation: it was held, upon issue joined on a return to a mandamus for compensation under 5 & 6 Will. 4, c. 76, s. 66, bringing in question the fact of the re-appointment, that it could not be proved by an entry in the minutes of the town council; and, therefore, although there was no doubt that *an* agreement to the effect contended for had been made, yet that it could not bind the corporation without being sealed.

Corn and coal meter.
Smith v. *Cartwright.*

And so it has been held (*i*) that a corn and coal meter to a corporation, who was entitled to receive for his own use certain fees for weighing coals from ships arriving at a port, must be appointed under seal, as he was an officer, and not a mere servant; and it was also held, that the tenure of his office, which was said to be during the pleasure of the corporation, did not make it unnecessary that he should have such an appointment, or convert him from an officer into a mere servant.

Attorney to railway company under their act.

But where the Act of Parliament constituting a railway company enacted that the directors should have the management and superintendence of the affairs of the company, and might appoint and displace any of the officers of the company, it was held by Wightman, J., to be clear, that under that section the directors might appoint the officers of the company by parol, and if so, that they might appoint an attorney in the same way (*k*).

R. v. *Lichfield.*

And where an attorney had been retained generally under the common seal of the borough, and had also been authorized and retained by a resolution of the town council, to take proceedings in opposition to a rule nisi for a mandamus, it was held

(*g*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860. In *Hall* v. *Mayor of Swansea*, 5 Q. B. 544, Patteson, J., said, "The only difference I see between *Arnold's case* and that of a servant employed at small wages, is the comparative inconvenience of insisting on a contract under seal in the latter case."

(*h*) *R.* v. *Mayor of Stamford*, 6 Q. B. 433.

(*i*) *Smith* v. *Cartwright*, 6 Exc. 927, *quære*, whether a corporation, by prescription, might prescribe to do certain corporate acts without seal, which acts by the general law would require the use of a seal. *Ibid.* 939.

(*k*) *R.* v. *Justices of Cumberland*, 5 D. & L. 431, note.

that this was a sufficient retainer to warrant the payment to him of the costs of so doing (*l*).

Cases in which solicitors recovered against corporations, though not appointed under seal, explained.

There are, moreover, some cases (*m*) in which it has been held, that the solicitors employed in obtaining the Acts of Parliament, incorporating certain companies, had a legal claim against them when incorporated, in respect of their services in obtaining the act of incorporation, although they were not, and, from the nature of the case, could not be, appointed under the seal of the corporate body. But in each of those cases there was a clause in the act directing that the costs of obtaining the act should be paid, in preference to all other claims, out of the first money received by the defendants, and those cases were decided on the ground, that the meaning of the legislature was to make the incorporated companies, as soon as they had obtained funds, debtors to the solicitors who had obtained the acts, for all the costs which they had incurred (*n*). Those cases do not, therefore, as at first might appears, form any exception to the general rule above stated.

Exceptions to general rule.

There are, nevertheless, some exceptions to that rule, probably coeval with the rule itself, in those matters which, from their very nature or necessarily frequent occurrence, it would be difficult or, perhaps, impossible to execute with the formality of a seal. Those are matters of trifling importance and of frequent occurrence, such as the appointment of a servant, cook or butler, or such as from their nature do not admit of delay, such as the appointment of a bailiff to distrain cattle damage feasant (*o*). And it has been held, that a corporation was liable to an action for an illegal distress, though not damage feasant, by one who acted as their bailiff, although he was not appointed under seal (*p*). And that a corporation might maintain an action of ejectment after a notice to quit, given by a steward who was not appointed under seal (*q*).

Appointment of servants.

Railway companies liable for torts of servants.

False imprisonment.

So, also, it has been held, in *The Eastern Counties Railway Company* v. *Broom* (*r*), that a railway company may be liable to an action of trespass for assault and false imprisonment, in consequence of their servant having given a person into custody on an unfounded charge, although the directions to the servant were not under seal. In that case, indeed, it does not appear whether the *original appointment* of the servant was by deed, though most probably he was not so appointed, as he was only an inspector. It is clear, however, that a corporation may be liable to an action for a wrong done by their servant, although

(*l*) *R.* v. *Lichfield*, 10 Q. B. 534; and see *R.* v. *Prest*, 16 Q. B. 32.

(*m*) *Tilson* v. *The Warwick Gas Light Company*, 4 B. & C. 962; and *Carden* v. *The General Cemetery Company*, 5 Bing. N. C. 253; *Hitchins* v. *The Kilkenny Railway Company*, 9 C. B. 536.

(*n*) See *Pardoe* v. *Price*, 16 M. & W. 460.

(*o*) *Manby* v. *Long*, 3 Lev. 107; *Cary* v. *Matthews*, 1 Salk. 191; see *per* Alderson, B., in *Finlay* v. *Bristol and Exeter Railway Company*, 7 Exc. 411.

(*p*) *Smith* v. *The Birmingham Gas Company*, 1 A. & E. 526.

(*q*) *Doe* v. *Pierce*, 2 Campb. 96; and see *Doe* v. *Bold*, 11 Q. B. 127; *Lowe* v. *The North Western Railway Company*, 18 Q. B. 632.

(*r*) 6 Exc. 314.

Malicious prosecution.

Libel.

his appointment be not under seal (*s*). And it would seem to be the better opinion that an action for malicious prosecution may, in some cases, be brought against a corporation for the acts of its officers and servants (*t*). And it has been held, both in England (*u*) and America (*x*), that a railway company is responsible, in its corporate capacity, for a libel published by its agents in the course of its business and of their employment.

But the above exceptions do not apply to cases in which an interest is vested in or divested out of a corpration; and, therefore, a corporation cannot, without deed, appoint a bailiff to seize goods as forfeited to the use of the corporation (*y*).

Foundation of exceptions.

The cases, however, in which it has been held that a cook or butler, or other inferior servant to a corporation, need not be appointed under the common seal, are said to rest on a fiction that some individual has been duly authorized to make contracts of that nature on behalf of the corporation (*z*). And it has not yet been settled whether the exceptions introduced by them, apply to the case of a corporation where no individual member is appointed head of the corporate body (*a*). When, however, the case shall arise, there can, it is conceived, be little or no doubt that the further development of the principles, founded on expediency and convenience, amounting almost to necessity, which have led, in England, to the engrafting of exceptions on the ancient rule of the common law, and, in America, to its total abolition (*b*), will lead to the conclusion that the excep-

(*s*) *Ibid.* And see *Roe* v. *The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 7 Exc. 36; *S. C.* 21 L. J., Exc. 9; *Giles* v. *Taff Vale Railway Company*, 2 E. & B. 822.

(*t*) *Stevens* v. *Midland Counties Railway Company*, 10 Exc. 352; *Whitfield* v. *South Eastern Railway Company*, 27 L. J., Q. B. 229.

(*u*) *Whitfield* v. *South Eastern Railway Company*, *ubi supra*.

(*x*) *The Philadelphia, Wilmington and Baltimore Railroad Corporation* v. *Quigley*, 21 Howard's Rep. 202. In that case Daniel, J., dissented from the judgment of the rest of the Court, and speaks of *Whitfield* v. *South Eastern Railway Company*, as "a solitary precedent most certainly contravening the course of decision for centuries;" and of the judgment in that case as "in its arguments and conclusions confused and obscure; and incongruous and contradictory, both in its reasoning and its conclusions. In the line of English adjudications it presents itself," says he, "as solitary and eccentric, and in opposition to the most inveterate, the clearest and reiterated distinctions announced by the sages of the law—distinctions having their foundation in reason and in the essential character of the subjects to which those distinctions have been applied." The author, however, ventures to think there is little doubt but that it will be upheld, should the question ever be carried to a Court of Appeal.

(*y*) *Horne* v. *Ivy*, 1 Mod. 18.

(*z*) See *per* Lord Cranworth in *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 819, 821.

(*a*) *Per* Lord Wensleydale in *Cope* v. *Thames Haven Dock and Railway Company*, 3 Exc. 844.

(*b*) See Story on Agency, s. 53; 2 Kent's Comm. 288, 291 (Part 4, Lect. 33); and see *Beverley* v. *Lincoln Gas Light and Coke Company*, 6 A. & E. 837, where Patteson, J., says, "There are obvious circumstances which justify their advancing with a

tions above mentioned apply equally to the case of all companies, whether with or without a head.

Exception in cases of trading corporations.

There is also another class of exceptions to the rule, that corporations can only be bound by contracts under seal, which has arisen in modern times. Corporations have, of late, been established sometimes by Royal Charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the courts have held, that they would imply in those who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist (*c*).

Contracts necessarily incident to purposes of corporation.

Accordingly, in a variety of cases, corporations have been held bound by, and able to take advantage of, contracts necessarily incident to the purposes and objects for which the corporation was created, although such contracts have neither been under the corporate seal, nor entered into by an agent or servant authorized in that manner to act for the corporation. The exception established by these cases (*d*), depends upon the principle, before adverted to, of expediency and convenience, amounting almost to necessity,—a principle, however, which, although in many cases equally applicable to contracts of hiring and service as to contracts of other descriptions, yet it is conceived would only apply to contracts for services of an *ordinary* description, and such as might be necessary for carrying on the business of the corporation (*e*).

Contract by shipping company to pay for bringing home disabled vessel.

Thus, a contract made by the directors of a steam navigation company, incorporated for the purpose of trading as shipowners, to pay for services in bringing home a disabled vessel, has been held to be binding upon the company, though not under seal, as one of the most ordinary incidents to the ownership of trading-vessels is the necessity of employing persons to bring home such

somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves."

(*c*) *Per* Lord Cranworth in *The Mayor of Ludlow* v. *Charlton*, 6 M. & W. 821; and see *Beverley* v. *Lincoln Gas Light and Coke Company*, 6 A. & E. 829; *Paine* v. *Strand Union*, 8 Q. B. 326; *Clarke* v. *Cuckfield Union*, Bail C. C. 81; *Smart* v. *West Ham Union*, 10 Exc. 867; 11 Exc. 867.

(*d*) Mr. Justice Story says truly "that this exception affords a beautiful illustration of the expansive power of the common law, which acquires flexibility and moulds itself from time to time, so as to accomplish the various ends of modern society." Story on Agency, s. 53.

(*e*) *Dunston* v. *The Imperial Gas Light and Coke Company*, 3 B. & Ad. 125; see *Clark* v. *The Imperial Gas Light and Coke Company*, 4 B. & Ad. 315, where it was held that the directors were justified in affixing the corporate seal to a deed granting a retiring pension to the plaintiff, who had been clerk to the company; and see *Gibson* v. *East India Company*, 5 Bing. N. C. 271; *Beverley* v. *Lincoln Gas Company*, 6 A. & E. 829; *Church* v. *Imperial Gas Company*, 6 A. & E. 853.

vessels as may have been accidentally disabled at a distance from home (*f*).

By Poor Law Guardians to pay for auditing clerk's accounts;

Upon similar principles in a case (*g*) in which the guardians of a Poor Law Union, having reason to believe that their clerk had been guilty of fraud, and that sums of money had been misappropriated, employed the plaintiff, who was an accountant, to audit their accounts, investigate them generally, and make up the books; and resolutions to this effect were from time to time entered in the rough minute book; but there was no contract under the seal of the guardians: it was held by Erle, J. (though Crompton, J., doubted), that the plaintiff having done the work agreed upon was entitled to recover, although the contract was not under seal. And Erle, J., said, "Here the work which was done by the plaintiff was incidental and necessary to the purposes for which the corporation was created, and was done at the request of the corporation. They had appointed proper officers to do the work, and they had reason to believe that there had been fraud, embezzlement, and a system of false accounting. Then, by the first resolution, they employ the plaintiff as an accountant to audit the accounts of the union. These services were quite essential to the purposes for which the guardians were created, and the first of them would probably be of short duration and not very difficult. It seems to have been highly important that the investigation should be made, and the subsequent employment was of much the same description, arising upon subsequent inquiries being made, and it was ordered by the guardians. The question of fact is, was this done by the plaintiff for the effecting of the purposes for which the guardians were appointed. It seems to me that it was." Crompton, J., however, thought otherwise, and was unable to distinguish the case from *The London Dock Company* v. *Sinott* (*h*).

but not contract by dock company to pay for cleaning docks.

That was an action by the dock company against the defendant for not performing a contract into which he had entered for scavenging the docks. But it was held by the Court of Queen's Bench that it could not be maintained, as the contract was not under the seal of the company; and the plaintiffs did not bring themselves within any of the exceptions to the general rule, that a corporation aggregate can only be bound by contracts under seal.

Contracts by joint stock companies.

Contracts of this nature are, in many cases, regulated by The Joint Stock Companies Act, 1856 (*i*), and The Companies Clauses Consolidation Act, 1845 (*k*), which last applies to all joint stock companies incorporated by Act of Parliament for the purpose of carrying on any undertaking, so far as the same

(*f*) *Henderson* v. *The Australian Royal Mail Steam Navigation Company*, 5 E. & B. 409; *S. C.* 24 L. J., Q. B. 322; and see *Reuter* v. *The Electric Telegraph Company*, 6 E. & B. 341; *S. C.* 26 L. J., Q. B. 46.

(*g*) *Haigh* v. *North Bierley Union*, 28 L. J., Q. B. 62.

(*h*) *The London Dock Company* v. *Sinott*, 27 L. J., Q. B. 129.

(*i*) 19 & 20 Vict. c. 47.

(*k*) 8 & 9 Vict. c. 16; see *Homersham* v. *The Wolverhampton Waterworks Company*, 6 Exc. 137.

are applicable thereto, except so far as expressly varied by the special act.

By the 91st section of the Companies Clauses Consolidation Act, 1845, the determination as to the remuneration of the secretary of a company is to be exercised only at a general meeting. But it is no answer to an action by a secretary for his salary, that no determination as to such salary has ever been exercised at any general meeting of the company (*l*). It may be a breach of trust as between the directors and the shareholders to agree to give the secretary a salary without the authority of a general meeting, but yet the company may be bound to pay it.

Binding if within scope of company,

The principle of this decision is an important one, and is in conformity with the cases in which it has been held, that a joint stock company registered under 7 & 8 Vict. c. 110 (*m*) was liable upon a contract within the scope and objects of the company *bonâ fide* entered into by the directors under seal, but not in conformity with the provisions of the deed of settlement of the company. If such a contract were illegal, of course it would not be binding (*n*).

though not in conformity with deed of settlement, if not illegal,

And although, generally speaking, where the seal is affixed to a contract made by a corporation in a manner binding upon them, the contract is the contract of the corporation, to be governed by the same rules of law as the contracts of private persons: yet, where a corporation is created by an Act of Parliament for particular purposes, with special powers, the contract does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is, that the Legislature meant that such a contract should not be made (*o*).

or *ultra vires*.

In modern times, also, another anomaly has been introduced into the law, which may not improperly be adverted to in this place, viz., that persons acting as trustees for public purposes, visiting justices and the like, may contract, though not bodies corporate, without rendering themselves personally liable, and may sue and be sued in the name of their clerk or secretary. This, no doubt, leads to difficulties; but it has become familiar, and it is perfectly well settled, that judgments so recovered are

Public trustees, &c. may be sued in name of clerk.

(*l*) *Bill* v. *Darenth Valley Railway Company*, 1 H. & N. 305; *S. C.* 26 L. J., Exc. 81.

(*m*) This act is repealed by 19 & 20 Vict. c. 47, s. 107; 20 & 21 Vict. c. 14, s. 23, except as to insurance companies, 20 & 21 Vict. c. 80.

(*n*) *Agar* v. *Athenæum Life Assurance Society*, 3 C. B., N. S. 725; *S. C.* 27 L. J., C. P. 95; *Prince of Wales Assurance Society* v. *Athenæum Assurance Society*, 27 L. J., Q. B. 297, and cases there cited; *Re Athenæum Life Assurance Company*, 27 L. J., Ch. 829. In these cases dissent from a dictum of Lord Wensleydale in *Ernest* v. *Nicholls*, 6 Ho. Lords Cas. 418, is expressed.

(*o*) *South Yorkshire Railway Company* v. *Great Northern Railway Company*, 9 Exc. 55; *Bateman* v. *Mayor of Ashton-under-Lyne*, 3 H. & N. 323; *S. C.* 27 L. J., Exc. 458; *Payne* v. *Mayor of Brecon*, 3 H. & N. 572.

not to be enforced otherwise than by *mandamus*, or bill in equity (*p*).

Hall v. *Taylor*. Local Commissioners may be sued for salary of clerk.

And accordingly, in a case (*q*) where commissioners, who were elected annually under a local act, and were authorized to carry out its provisions for the internal management of a town, were empowered to appoint a clerk and other necessary officers, and to pay them reasonable salaries out of the monies to be raised by rates and tolls: they were to sue and be sued in the name of their clerk, who was to be reimbursed all costs and expenses out of the same fund, and not to be personally liable for them; power was given to them to enter into certain specified contracts; no power was expressly given to them to retain an attorney, but the nature of their powers would render legal assistance necessary, and the plaintiff was appointed clerk by one set of commissioners, no salary being mentioned, and reappointed next year, by the succeeding commissioners, at a fixed salary, and he also did business within the scope of the act for the same commissioners on their retainer: it was held, that he might maintain an action of contract against the commissioners for the time being, in the name of their clerk, for the services thus rendered to former commissioners.

Power to appoint servants without seal only applies to ordinary servants.

It has been decided, that where the special Act of Parliament gave power to the directors of a company to appoint servants and workmen, &c., without using the corporate seal, they could only exercise that power with regard to the appointment of *ordinary* servants; and that it did not extend to enable them to enter into a contract for extraordinary services, which would be binding upon the company, without affixing the corporate seal (*r*).

Cox v. *Midland Counties Railway Company*.

The question as to how far the directors of a railway company had power, under their special act, to appoint servants otherwise than by deed was raised in the case of *Cox* v. *The Midland Counties Railway Company* (*s*), and the court, in giving judgment (*t*), intimated an opinion that, under their act, they probably did possess the power; but it became unnecessary to decide the point on that occasion, as it was held that, assuming the servant in that case to have been properly appointed, yet that he had not power to bind the company by entering into the contract on which the action was brought.

Trading company bound to have authorized officer on the spot.

It has been laid down by all the judges in the Exchequer Chamber (*u*), that it is the duty of a company carrying on

(*p*) *Kendall* v. *King*, 17 C. B. 510. The mere fact that they have no funds would not prevent the plaintiff recovering *judgment* in the action. *Ibid.* *Wormell* v. *Hailstone*, 6 Bing. 668; *Emery* v. *Day*, 1 C. M. & R. 245.

(*q*) *Hall* v. *Taylor*, 1 E. B. & E. 107; *S. C.* 27 L. J., Q. B. 311.

(*r*) *Cope* v. *The Thames Haven Dock and Railway Company*, 3 Exc. 841; see *Diggle* v. *The London and Blackwall Railway Company*, 5 Exc. 442; *East London Waterworks Company* v. *Bailey*, 4 Bing. 283.

(*s*) 3 Exc. 268.

(*t*) Page 274.

(*u*) *Giles* v. *Taff Vale Railway Company*, 2 E. & B. 822; and see *Birkett* v. *The Whitehaven Junction Railway Company*, 28 L. J., Exc. 348.

trade to have on the spot an officer with authority to do for the company all that in the ordinary exigencies of their business may require to be done promptly, and in this respect there is no difference between an ordinary partnership and a corporation, and that it was not necessary to show any authority under seal to the general superintendent of the company to render the company liable for acts which he was authorized to do.

BANKRUPTS AND INSOLVENTS.

Bankrupt or insolvent may sue for wages in respect of his personal labour.

An uncertificated bankrupt or an insolvent may himself maintain an action for the profits of his *personal* labour and skill after his bankruptcy or insolvency, and his assignees have no right to interfere (*x*); indeed, in one case, it was held that he might even sue *them* where they had employed him to carry on the business (*y*). And where materials furnished are necessary to the bankrupt's labour, the work and materials *may* become so blended together as to form one joint cause of action, upon which the bankrupt himself may sue and be entitled to recover, his assignees not interfering (*z*).

Materials blended with work.

Furniture broker.

But a furniture broker, who was employed in moving goods, in the course of which employment he procured vans, supplied packing-cases, &c., and employed five or six men, and likewise cleaned and repaired furniture, was held not to be a man using merely his personal labour, and therefore that he could not recover the amount of his bill for so doing if the assignees thought proper to put in their claim (*a*).

Surgeon and apothecary.

And so it was held, that a man carrying on business as a medical practitioner, who was in possession of his original stock of medicines on credit, and procured more on credit, and with these and his personal skill pursued his occupation for profit, could not sue for his work and labour as a surgeon and apothecary, and for medicines, after he had become bankrupt and his assignees had claimed the debt (*b*).

Assignees entitled to stipulated damages for breach of contract to employ workman who has become bankrupt.

And where A. agreed to serve B. and C., who were type-founders, as their foreman, for seven years, at fixed wages, at the rate of three guineas a week, "the party making default to pay to the other the sum of 500*l.* by way or in the nature of specific damages." A. was dismissed, then became bankrupt, and after the bankruptcy brought an action upon the agreement for the amount of the penalty, to which the defendants pleaded

(*x*) *Chippendall* v. *Tomlinson*, 4 Doug. 318; *S. C.* 1 Co. Bankr. Law, 432; see 7 East, 57, note 6; *Beckham* v. *Drake*, 2 Ho. Lords Cases, 579, 643; *Williams* v. *Chambers*, 10 Q. B. 337; and cas. cit. *Ex parte Walters*, 2 Mont. D. & De Gex, 635.

(*y*) *Coles* v. *Barrow*, 4 Taunt. 754; but see *Nias* v. *Adamson*, 3 B. & Ald. 232, where Best, J., said of *Coles* v. *Barrow*, "If Mr. Justice Lawrence had continued in the Court of Common Pleas that decision would probably not have been pronounced. It is not, therefore, entitled to any great weight. The authority of that case is much broken in upon by *Hesse* v. *Stevenson*, 3 B. & P. 578.

(*z*) *Silk* v. *Osborn*, 1 Esp. 140.

(*a*) *Crofton* v. *Poole*, 1 B. & Ad. 568.

(*b*) *Elliot* v. *Clayton*, 16 Q. B. 581.

his bankruptcy: it was held by the House of Lords that the action could not be maintained, as the right of action passed to his assignees (*c*), on the ground that the contract contained a clause imposing a penalty for the breach thereof, *for which penalty* the action was substantially brought (*d*).

Bankrupt master.

Under the old Bankrupt Act (*e*) it was held that a commission of bankrupt did not operate as a dissolution of a contract of hiring between the bankrupt and his clerk, and the bankrupt was held liable to pay his clerk's wages due from the expiration of the year last before the commission up to the time of rescinding the contract of hiring notwithstanding the bankruptcy (*f*).

(*c*) *Beckham* v. *Drake*, 2 Ho. Lords Cases, 579.

(*d*) See *per* Maule, J., in *Bell* v. *Carey*, 8 C. B. 894.

(*e*) 6 Geo. 4, c. 16.

(*f*) *Thomas* v. *Williams*, 1 A. & E. 685; see further on this point, *post*, Ch. 4.

CHAPTER II.

THE CONTRACT OF HIRING AND SERVICE.

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1. THE REQUISITES OF A CONTRACT OF HIRING AND SERVICE.

WHEN WRITING NECESSARY—THE STATUTE OF FRAUDS.

By the Common Law a servant might be hired, either by deed or by a parol contract (*a*); but when hired or retained by deed, could only be discharged by an equally formal instrument (*b*). When hired by parol, he might also be discharged by parol (*c*). Since the passing of the Statute of Frauds, however, it has become necessary, in many cases, that contracts of hiring should be in writing.

By common law might be either by deed or parol.

Since the Statute of Frauds, writing necessary in some cases.

By the fourth section of that statute (*d*) it is enacted, "that no action shall be brought (*e*) upon any agreement that is not to

The Statute of Frauds.

(*a*) A contract is called a Parol Contract, when either verbal, or in writing, but not under seal; see *Beckham* v. *Drake*, 9 M. & W. 79.

(*b*) *i. e.*, from the *contract*, for he might be discharged from the *service*, so as to prevent his gaining a settlement, by parol agreement. *Pawlet* v. *Burnham*, 1 Sess. Ca. 71; 2 Bott. 424.

(*c*) Dalt. Just. c. 58; *R.* v. *Daniel*, 6 Mod. 182.

(*d*) 29 Car. 2, c. 3. The corresponding Irish Act is 7 Will. 3, c. 12.

(*e*) The case of *Carrington* v. *Roots*, 2 M. & W. 248, decided that not only can no action be brought upon an agreement within this section, if it be not reduced into writing; but that the contract is for all purposes void. See *Reade* v. *Lamb*, 2 L. M. & P. 67, 69; *S. C.* 6 Exc. 130; but see *Leroux* v. *Brown*, 12 C. B. 801.

be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized."

Construction of statute.

In this enactment the word "*performed*," means a complete and not a mere inchoate or partial performance; and therefore where an agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, it is within the statute; but where the contract is such that the whole may be performed within a year, and there is no stipulation to the contrary, the statute does not apply (*f*).

Bracegirdle v. *Heald.*

Accordingly, where (*g*) the defendant *verbally* agreed on the 27th of May to take the plaintiff into his service as groom and gardener for a year, to commence on the 30th of June following, but afterwards refused to receive him, it was held that the plaintiff could not sustain any action for such breach of contract, as there was no written agreement, Lord Ellenborough, C. J., saying, "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the act."

Snelling v. *Lord Huntingfield.*

So, where (*h*) the defendant on 20th July proposed to hire the plaintiff as bailiff for one year, to commence on the 24th of July, and the defendant at that time wrote a memorandum (but which was signed by neither of the parties), which was delivered to the plaintiff, and by him taken away, stating the terms on which the plaintiff was to serve, and the plaintiff entered the defendant's service on the 24th, but before the expiration of the year the defendant, being displeased with the plaintiff, gave him a month's warning to quit his service, and the plaintiff left before the expiration of the year. It was held that he could not maintain an action against the defendant for not continuing the plaintiff for the year, as there was no agreement in writing, in conformity with the Statute of Frauds.

Giraud v. *Richmond.*

And where (*i*) the plaintiff entered into the service of the defendant under the following agreement; "I agree to receive you as clerk or bookkeeper in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary *at the following rates*, viz., for the first year 70*l.*; for the second, 90*l.*; for the third, 110*l.*; for the fourth, 130*l.*; and 150*l.* for the fifth and following years that you may remain in my employment; and I also agree in case of the death of either of us to return 150*l.*:" it was held that the agreement was one

(*f*) *Per* Tindal, C. J., *Souch* v. *Strawbridge*, 2 C. B. 815; *Boydell* v. *Drummond*, 11 East, 142. The cases on this subject will be found collected in 1 Smith's L. C., note to *Peter* v. *Compton*; and see *Cherry* v. *Heming*, 4 Exc. 631; *S. C.* 19 L. J., Exc. 63.

(*g*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Dobson* v. *Collis*, 1 H. & N. 81, *post*, p. 23.

(*h*) *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 20.

(*i*) *Giraud* v. *Richmond*, 2 C. B. 835.

that, by the Statute of Frauds, was required to be in writing; and that, there being a precise stipulation for yearly payments, evidence was not admissible to show a verbal agreement for quarterly payments.

No action can be brought in the Courts of this country to enforce an oral agreement made abroad (and valid there), which, if made here, could not, by reason of the Statute of Frauds, have been sued upon.

No action lies here on contract made abroad if within statute.

Where, therefore, an oral agreement was entered into at Calais between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighbourhood for transmission to England, the employment to commence at a future day, and to continue for one year certain; it was held that no action could be maintained in this country for breach of the agreement, although, by the law of France, such an agreement is capable of being enforced, although not in writing (*k*).

Leroux v. *Brown*.

The mere circumstance that a contract is defeasible, and may be put an end to within the year, does not take it out of the operation of the Statute of Frauds, if, by its terms, it is to continue for more than a year, in case it is not put an end to (*l*).

Defeasible contract within the statute.

Therefore, where (*m*) the defendants on the 2nd of October, 1854, verbally agreed to employ the plaintiff as a traveller until the 1st of September, 1855, and for a year thereafter, unless the employment were determined by three months' notice given by the plaintiff or defendants respectively, it was held, that no action could be maintained by the plaintiff for wrongful dismissal before the 1st of September, as the contract was not in writing, and it was not the less a contract not to be performed within the year, because it might be put an end to within that period. And Alderson, B., added, "See the absurdity of holding otherwise: at the end of two years and a half one of the parties might claim a right to put an end to a parol contract for five years, by giving three months' notice, but the very subject of dispute might be whether or no he had a right to give such notice. That shows this is a contract within the statute."

Dobson v. *Collis*.

But a contract to serve for an indefinite period, subject to be put an end to at any time upon a reasonable notice, is not within the statute, though it may extend beyond the year (*n*). A contingency is not within the statute, nor any case that depends upon a contingency (*o*).

Contract for an indefinite time not within it.

The words of the statute "not to be performed," mean, not to be performed on one side or the other (*p*). Where, therefore, the contract has been, or is capable of being, *completely* per-

Statute does not apply to contract completely executed on one side.

(*k*) *Leroux* v. *Brown*, 12 C. B. 801.

(*l*) *Birch* v. *Earl of Liverpool*, 9 B. & C. 392; and see *Roberts* v. *Tucker*, 3 Exc. 632.

(*m*) *Dobson* v. *Collis*, 1 H. & N. 81; *S. C.* 25 L. J., Exc. 267.

(*n*) *Per* Tindal, C. J., in *Souch* v. *Strawbridge*, 2 C. B. 815.

(*o*) *Per* Denison, J., in *Fenton* v. *Emblers*, 3 Burr. 1278.

(*p*) *Donellan* v. *Read*, 3 B. & Ad. 899; *Smith* v. *Neale*, 26 L. J., C. P. 144; 2 C. B., N. S. 67.

But does, if not completely executed on one side.

formed on one side, the statute does not apply (*q*). The consideration, when entire, cannot be split: where, therefore, any part of it is not executed, the statute has been held to apply (*r*). Cases, however, may arise, in which there may be two separate promises on separate considerations in one agreement, to one of which the Statute of Frauds may apply, whilst the other is not within that statute. In such cases an action may be brought upon the promise to which the statute does not apply, although not in writing (*s*).

Statute does not apply to an implied hiring;

or a hiring by deed;

or affect cases of settlement by hiring and service;

or action for wages for services performed;

except as to amount of wages.

But the statute does not apply where an agreement for a yearly hiring is merely *implied* from circumstances (*t*). And it would seem to be the better opinion, that it does not apply where the agreement is by deed (*u*), as the object of the statute would be satisfied where the terms of the agreement were reduced into writing, and authenticated by a seal or mark. Nor does the statute, or the decisions upon it, affect the question of what is a sufficient hiring to confer a settlement by service under it (*x*). And the absence of an agreement, in compliance with the Statute of Frauds, would not defeat an action for wages in respect of services actually performed, though the amount which a plaintiff in such a case could recover, would depend upon what his services *were worth*, irrespectively of any agreement.

Nor certain cases under 4 Geo. 4, c. 34.

And in the case of a dispute between master and servant, within the meaning of the statute 4 Geo. 4, c. 34, the absence of a contract in writing would not take the case out of the jurisdiction of a magistrate *where the service had been entered into* (*y*).

Formal agreement not necessary.

Mere acknowledgment sufficient.

Roberts v. *Tucker.*

Where an agreement in writing is necessary, under the terms of the Statute of Frauds, it is not necessary that there should be a *formal* agreement, signed by the party to be charged; any acknowledgment in writing, that he had entered into such an agreement, would be a sufficient memorandum within the statute (*z*), if made *before* action brought. An acknowledgment made *afterwards* would not do (*a*). But it has been held, that the mere nomination to the bishop of the diocese, of the plaintiff as the defendant's curate, is not a sufficient acknowledgment (*b*).

(*q*) *Cherry* v. *Heming*, 4 Exc. 631; 19 L. J., N. S., Exc. 63, *S. C.*; *Souch* v. *Strawbridge*, and *Smith* v. *Neale*, *ubi supra*. But see 1 Byth. Conv. (3rd ed.) 310, 311; 1 Smith's L. C. 143, note to *Peter* v. *Compton*.

(*r*) *Cocking* v. *Ward*, 1 C. B. 858; *Hodgson* v. *Johnson*, 28 L. J., Q. B. 88.

(*s*) *Green* v. *Saddington*, 7 E. & B. 583; *Hodgson* v. *Johnson*, *ubi supra*.

(*t*) *Beeston* v. *Collyer*, 4 Bing. 309.

(*u*) *Cherry* v. *Heming*, 4 Exc. 631; *S. C.* 19 L. J., N. S., Exc. 63; *Cooch* v. *Goodman*, 2 Q. B. 580.

(*x*) See *per* Bayley, J., in *Bracegirdle* v. *Heald*, 1 B. & Ald. 722.

(*y*) See s. 3, and *R.* v. *Lord*, 12 Q. B. 762.

(*z*) *Roberts* v. *Tucker*, 3 Exc. 632, 641; *Longfellow* v. *Williams*, Peake's Add. Cas. 225.

(*a*) *Bill* v. *Bament*, 9 M. & W. 36.

(*b*) *Roberts* v. *Tucker*, *ubi supra*.

Note to third person.

It would seem, however, that a note or letter written to a third person, would be sufficient to satisfy the statute (*c*). And even a note addressed to the other contracting party, attempting to withdraw from the agreement, may supply the name if not mentioned in the agreement (*d*).

Agreement may be collected from numerous papers.

It matters not from how many different papers the agreement be collected, provided they are connected in sense (*e*), for the writing is merely evidence of the contract which is made before any signature thereof by the parties (*f*). If they refer to one another, they may be connected by parol evidence (*g*).

What is required to be in writing in cases within Statute of Frauds.

The statute enacts, that "*the agreement, or some memorandum or note thereof*," shall be in writing, &c. This word "agreement" includes the consideration upon which the agreement of the party to be charged is founded, as well as his promise (*h*).

Consideration must appear, either expressly

In every written contract of hiring and service, therefore, the consideration must appear, either expressly or by necessary implication, or the contract cannot be enforced (*i*). Thus, where (*k*) the defendant signed the following agreement, "I hereby agree to remain with L. for two years from the date hereof, for the purpose of learning the business of a dressmaker," it was held that L. could not maintain an action against the defendant for leaving her service before the expiration of the two years, as the agreement did not show any obligation on L. to teach the defendant, and was, therefore, void for want of mutuality.

Lees v. *Whitcomb*;

Sykes v. *Dixon*;

And where (*l*) B. signed an agreement to "work for and with S., manufacturer of powder-flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months; and so on from twelve months end to twelve months end, until I shall give the said S. twelve months' notice in writing that I shall quit his service;" the agreement was held void for want of mutuality, as S. was not bound to employ B.; and, therefore, it was also held that S. could not maintain an action against the defendant for harbouring B.

Payne v. *New South Wales Coal Company*;

So, upon similar principles, an agreement by the defendants, that the plaintiffs should have the defendants' shipbroking business at the port of Sydney, upon certain terms, and that the defendants would provide the plaintiffs with a free passage to that colony, was held void, as not disclosing any considera-

(*c*) See 12 C. B. 818, 822.

(*d*) *Warner* v. *Willington*, 25 L. J., Ch. 662.

(*e*) *Boydell* v. *Drummond*, 11 East, 152; 1 Smith's L. C., note to *Birkmyr* v. *Darnell*. See *per* Maule, J., in *Weedon* v. *Woodbridge*, 13 Q. B. 475.

(*f*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 744.

(*g*) *Ridgway* v. *Wharton*, 6 Ho. Lords Cas. 238; 27 L. J., Ch. 46.

(*h*) *Wain* v. *Warlters*, 5 East, 10; *Saunders* v. *Wakefield*, 4 B. & A. 596; and cases cited in 1 Smith's L. C., note to *Birkmyr* v. *Darnell*; see also 1 Wms. Saund. 211; Puff. lib. 5, c. 2, s. 2; Grot. lib. 2, c. 11, s. iv. 2.

(*i*) 1 Wms. Saund. 211, note *d*.

(*k*) *Lees* v. *Whitcomb*, 5 Bing. 34; and see *Sweet* v. *Lee*, 3 M. & G. 466.

(*l*) *Sykes* v. *Dixon*, 9 A. & E. 693.

tion, the plaintiffs not being bound to work for the defendants (*m*).

or by implication.

All the cases, however, agree that it is enough if the consideration can fairly be collected from the terms of the writing (*n*).

Pilkington v. *Scott.*

Therefore, where (*o*) the plaintiffs agreed in writing with L. that he would at all times, during the term of seven years, serve them as a crown-glass maker; that he would not, during the said term, work for any other person at any other glass-house or place of business, without the license of the plaintiffs; that it should be lawful for the plaintiffs to deduct from his wages any fine that he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages; that the plaintiffs should pay him when and so long as he should continue to be employed and work as a crown-glass maker, wages by the piece, (stating them,) and 8*l.* per annum in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's wages or a month's notice: it was held that, looking at the agreement altogether, it sufficiently appeared that the plaintiffs were bound to employ L. for the seven years subject to the notice, and that L. was bound to serve them for that period on the same terms; and therefore that the contract was binding on the parties, and might be made the foundation of an action against the defendants for harbouring and employing the plaintiffs' servant.

Hartley v. *Cummings.*

And so, where (*p*) P. contracted to serve the plaintiff and his partners, for the time being, for seven years, in the business of a glass and alkali manufacturer, and at all times, during the term, to do his best endeavours and use his utmost care and diligence in the works; and further, that he would not at any time during the term neglect or absent himself from the said service without the consent in writing of the plaintiff or his partners for the time being, or either or such of them as should carry on the business, nor would work for or serve any other person without such consent; in consideration of which service the plaintiff agreed to pay P. 24*s.* per week for a certain amount of work, and to find him some other description of work, provided he should not require that quantity of the specified work, so that P.'s wages should not be less than 24*s.* per week, except when a furnace should be out, when P. agreed to work for 21*s.* per week; and it was agreed, that if P. should be sick or incapacitated from performing the service, or in case of misconduct, or if the plaintiff or his partners for the time being, or either or such of them as should carry on the trade, should

(*m*) *Payne* v. *The New South Wales Coal, &c., Company*, 10 Exc. 283.

(*n*) *Per* Wightman, J., in *Powers* v. *Fowler*, 4 E. & B. 518.

(*o*) *Pilkington* v. *Scott*, 15 M. & W. 657.

(*p*) *Hartley* v. *Cummings*, 5 C. B. 247; and see *Williamson* v. *Taylor*, 5 Q. B. 175; *R.* v. *Welch*, 2 E. & B. 357; *Re Bailey*, 3 E. & B. 607.

discontinue the trade during the term—in either of such cases the plaintiff or his partners should be at liberty to retain or employ any other person in the room or stead of P., without being obliged to pay him any wages or satisfaction: it was held, that there was no want of mutuality in the contract, and that the plaintiffs were bound to employ P., and might maintain an action against the defendant for seducing P. from their service and harbouring him after notice.

Courts will not inquire into adequacy of consideration;

but it must not be illegal.

And if there sufficiently appear to have been *a* consideration, the courts will not inquire into the *adequacy* of it, for that were, in truth, to inquire whether the parties have or have not made a good bargain, which must be left to the parties themselves to settle (*q*). But if the consideration appear to be illegal (*r*), either on the ground of fraud or immorality, or as being contrary to public policy, or the enactments of any statute, the whole agreement will be vitiated, and cannot be made the foundation of any action (*s*).

Contract for service and cohabitation void.

Thus a contract for service and cohabitation would be void, and could not be enforced in a court of law, and parol evidence would be admissible to show whether the consideration for the hiring was wholly or in part cohabitation (*t*).

If one of several considerations illegal, the whole contract void.

If consideration good,

And where a contract is made on several considerations, any one of which is illegal, the whole contract is void (*u*). If, however, the consideration be good, and the contract be partly good and partly bad, and that part which is good can be separated from that which is bad, the good part may be sustained, provided the declaration be framed so as to meet the proof of that

(*q*) *Hitchcock* v. *Coker*, 6 A. & E. 438; *Archer* v. *Marsh*, 6 A. & E. 659; *Pilkington* v. *Scott*, 15 M. & W. 657; *Hartley* v. *Cummings*, 5 C. B. 247; *Sainter* v. *Ferguson*, 7 C. B. 716.

(*r*) In *Paxton* v. *Popham*, 9 East, 421, Lord Ellenborough said, "Since the case of *Pole* v. *Harrobin*, in 1782, it has been generally understood that an obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond." And see *Josephs* v. *Pebrer*, 3 B. & C. 639; *Cope* v. *Rowlands*, 2 M. & W. 157; *Græme* v. *Wroughton*, 11 Exc. 146.

(*s*) Parol evidence to show that the consideration is illegal, if such be the case, is held to be admissible on the grounds of public policy, and not for the sake of the defendant; but because courts of law will not lend their aid to a plaintiff who seeks to enforce an illegal or immoral contract. See *Collins* v. *Blantern*, 2 Wils. 350; 1 Smith's L. C. 169; *Holman* v. *Johnson*, Cowp. 341; Ch. on Contr. 570; *Abbott* v. *Hendricks*, 1 M. & G. 791; *Gas Light and Coke Company* v. *Turner*, 6 Bing. N. C. 327.

(*t*) *R.* v. *Northwingfield*. 1 B. & Ad. 912. This was a case of settlement, it is true, and not between the parties to the contract; but it illustrates the rule above given. See *Bradshaw* v. *Hayward*, Carr. & M. 591, where the defendant was allowed to prove an agreement for cohabitation without pleading it, in answer to an action for wages.

(*u*) *Jones* v. *Waite*, 1 Bing. N. C. 656; *S. C.* in Cam. Scacc. 5 Bing. N. C. 341; *S. C.* in Dom. Proc. 9 Cl. & Finn. 101; *Shackell* v. *Rosier*, 2 Bing. N. C. 634; and see *Hopkins* v. *Prescott*, 4 C. B. 578; *Nicholls* v. *Stretton*, 10 Q. B. 346.

and contract partly good, good part may be supported.

part of the contract which is good (*x*). A distinction, however, has been taken as to what is illegal at common law, and what is made illegal by particular statutes; and it has been said that the latter would vitiate the whole instrument, the former only that part which is illegal (*y*). But whether the whole is vitiated or not must depend, in great measure, on the enactments of the particular statute.

Difference between illegality at common law and by statute.

Contract of hiring made on a Sunday valid.

A contract of hiring and service for a year, made on a Sunday, between a farmer and a labourer, is valid, notwithstanding the statute 29 Car. 2, c. 7, s. 5, which enacts that no tradesman, artificer, workman, labourer or any person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's-day (*z*).

Other requisites of the Statute of Frauds.

Signature,

of party to be charged sufficient.

Where the agreement is one which, by the Statute of Frauds, is required to be in writing, it must also "be signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." It is not, however, necessary to prove an agreement signed by *both* parties. It is sufficient if signed by the *party to be* charged (*a*), even if conditional, if accepted by word of mouth by the other party (*b*), but notice of such acceptance must be given (*c*). And this is enough, although it conclude "As witness our hands" (*d*). Mere initials, however, are not sufficient (*e*). Signature at the commencement may be good, as "I., A. B., agree" (*f*). But if, in such a case, the agreement conclude, "As witness our hands," it should be signed by the party to be charged at the end (*g*). And if not signed at the end, it is a question for the jury, if the party meant to be bound by it (*h*). In any case the writing must, of course, be signed before action brought (*i*).

Or his agent.

If the agreement be signed by an agent, it will be sufficient if he were *lawfully* authorized, it is not necessary that he should be authorized *in writing* (*k*). A subsequent adoption of the act of the agent is equivalent to a previous authority, and is suf-

(*x*) Co. Litt. 206 *b*, note: *Wood* v. *Benson*, 2 Cr. & J. 95; and see *Price* v. *Green*, 16 M. & W. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346; *Sterry* v. *Clifton*, 9 C. B. 110.

(*y*) *Per* Bayley, J., in *Wood* v. *Benson*, 2 Cr. & J. 95; *Chater* v. *Beckett*, 7 T. R. 201; *Thomas* v. *Williams*, 10 B. & C. 664; and see 1 Wms. Saund. 66, note to *Butler* v. *Wigge*.

(*z*) *R.* v. *Whitnash*, 7 B. & C. 596.

(*a*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Hughes* v. *Budd*, 8 Dowl. 478; and see 3 M. & G. 462, note.

(*b*) *Smith* v. *Neale*, 26 L. J., C. P. 143; *Powers* v. *Fowler*, 4 E. & B. 517.

(*c*) 4 E. & B. 519, note.

(*d*) *Norton* v. *Powell*, 4 M. & G. 42.

(*e*) *Sweet* v. *Lee*, 3 M. & G. 452.

(*f*) *Knight* v. *Croekford*, 1 Esp. 190; and see *Lobb* v. *Stanley*, 5 Q. B. 574, note commencing with the defendant's name.

(*g*) *Hubert* v. *Treherne*, 3 M. & G. 743.

(*h*) *Johnson* v. *Dodgson*, 2 M. & W. 653. As to the absence of any date, see *Symmons* v. *Want*, 2 Stark. 371.

(*i*) *Bill* v. *Bament*, 9 M. & W. 36; but see 11 C. B. 970.

(*k*) 1 Smith's L. C. 322, note to *Whitcomb* v. *Whiting*. Sect. 3 of the Statute of Frauds requires that an agent under that section should be authorized *in writing*, and in that point differs from s. 4. See *Blogg* v. *Kent*, 6 Bing. 614.

ficient to satisfy the requirements of the statute (*l*). And in one case (*m*) it was held that a subsequent adoption of another person's act was sufficient, although he did not, at the time he acted, assume to act as agent.

THE STAMP.

Stamp.

The Schedule to the General Stamp Act (*n*), which imposes a duty upon agreements, &c. contains exemptions in favour of any

"Memorandum or agreement for the hire of any labourer, artificer, manufacturer or menial servants;

"Memorandum, letter or agreement made for or relating to the *sale* of any *goods*, wares or merchandise;

"Memorandum or agreement made between the master and mariners of any ship or vessel for wages, on any voyage coastwise from port to port in Great Britain" (*o*).

Contracts for service in colonies exempt.

And by 17 & 18 Vict. c. 83, s. 21, "all indentures of apprenticeship, bonds, contracts and agreements entered into in the United Kingdom, for or relating to the service in any of her Majesty's colonies or possessions abroad, of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry or labourer," are exempted from all stamp duty.

Agreement to be within Stamp Acts must be evidence against both parties. *Vaughton* v. *Brine*.

In order that an agreement may come within the Stamp Act and require a stamp, it must be such an agreement as would be evidence against *both* the contracting parties; and, therefore, where (*p*) the defendants, being the provisional committee of an unincorporated association, made and signed a resolution "that E. T. be managing director of this association for three years, and John Vaughton (the plaintiff) secretary for the same period; that the remuneration to the former be settled at some future meeting; the latter to receive five pounds per week, and to act under the direction of the provisional committee;" but it did not appear that the plaintiff was present when it was made, or that he was consulted with respect to it, the Court of Common Pleas held that it did not require a stamp, not being either an agreement or a memorandum of agreement. It might have been a proposal or an authority to enter into a contract.

Lucas v. *Beach*.

But where the minute of a resolution at a public meeting about a turnpike road, that the plaintiff, who was a surveyor,

(*l*) *Maclean* v. *Dunn*, 4 Bing. 722.

(*m*) *Kinnitz* v. *Surry*, Paley on Ag. 171, note, quoted in *Maclean* v. *Dunn*. See, however, *Wilson* v. *Tumman*, 6 M. & G. 236.

(*n*) 35 Geo. 3, c. 184. See now 7 & 8 Vict. c. 21; 13 & 14 Vict. c. 97, as to the stamp on agreements.

(*o*) By the Merchant Shipping Act, 1854. 17 & 18 Vict. c. 104, ss. 2, 149; agreements between masters of ships and seamen, if made in the form sanctioned by the Board of Trade, are exempt from stamp duty. As to who are seamen, see s. 2; and by s. 143, all indentures of apprenticeship to the sea service are also exempt.

(*p*) *Vaughton* v. *Brine*, 1 M. & G. 359; and see *Beeching* v. *Westbrook*, 8 M. & W. 411; *Knight* v. *Barber*, 16 M. & W. 66; *Vollans* v. *Fletcher*, 1 Exc. 20; *Marshall* v. *Powell*, 9 Q. B. 779.

should be allowed an additional sum for extra trouble he would have, was read over to the plaintiff and assented to by him, it was held to require an agreement stamp (*q*).

Fraser v. *Bunn.*

A mere admission in a letter to a third person that the plaintiff was in the defendant's service does not require a stamp, not being an agreement between the parties (*r*).

Exemptions in Stamp Act do not apply to apprentices, but do to firemen and stokers on board a steamboat. *Wilson* v. *Zulueta.*

The exemptions in the Stamp Act have been held (*s*) only to apply to the case of hiring, and not to the case of apprenticeship or to an agreement for the hire of a clerk (*t*). "Firemen and stokers" on board a steamer have been held (*u*) to come within the above exemption as labourers and artificers, and not to be mariners under 7 & 8 Vict. c. 112 (*x*), Coleridge, J., saying: "It appears from the contract that they undertake to do the work and discharge the duty of firemen and stokers, and to obey the orders of the engineer. Now it is quite certain if this were the case of a locomotive engine belonging to a railway company, and these persons had agreed to do the same in connexion with it, they might well be called labourers if not artificers. So in this case I do not think they made themselves ordinary seamen, but that they engaged for the particular duty of doing the work of firemen or stokers, subject to the order of the engineer, and therefore are fairly within the exemption in the Stamp Act."

And an overseer in a printing-office has been held by Pollock, C. B., at Nisi Prius, to be an "artificer" within the Stamp Act (*y*).

Mixed contracts.

In cases of mixed contracts, that is, contracts for the hire of labourers, &c. and something else, the question, whether or not the contract is exempt from stamp duty as coming within the above exceptions, must be determined by considering the whole scope and object of the contract. If its primary and main object be the hire of labourers, &c. it would be free from stamp duty, and not the less within the above exception, because it also contained some secondary or collateral stipulations to which the above exception would not apply. But if on the other hand, the primary and main object of the contract be something clearly not within the above exception, then the mere addition of a secondary or collateral contract of hiring would not bring the case within the exemptions (*z*).

Hughes v. *Budd.*

In *Hughes* v. *Budd*, the following agreement was held to require a stamp, and for want of one the plaintiff was nonsuited in an action for work and labour: "A memorandum of agree-

(*q*) *Lucas* v. *Beach*, 1 M. & G. 417.

(*r*) *Fraser* v. *Bunn*, 8 C. & P. 704.

(*s*) *R.* v. *St. Paul, Bedford*, 6 T. R. 452.

(*t*) 2 Cr. & Dix. Cir. Rep. (Irish) 225.

(*u*) *Wilson* v. *Zulueta*, 14 Q. B. 405; *S. C.* 19 L. J., Q. B. 49. And see *R.* v. *Wortley*, 2 Den. C. C. 333; *S. C.* 21 L. J., M. C. 44, *post*, p. 40; where W. was held to be a labourer within the meaning of the exemption in the Stamp Act.

(*x*) See now 17 & 18 Vict. c. 120.

(*y*) *Bishop* v. *Letts*, 1 F. & F. 401.

(*z*) *Smith* v. *Cator*, 2 B. & Ald. 778; *Sadler* v. *Johnson*, 16 M. & W. 775; *Chatfield* v. *Cox*, 18 Q. B. 321.

ment between Isaac Hughes, quarryman, and the Y. Iron Company, that is, the said Isaac Hughes, quarryman, do engage to quarry a sufficient quantity at Craig Grew, to complete a dry wall which is to be erected from the canal bridge to the Swansea road, which wall is to continue both sides of the new road as above mentioned. The stones are to be of a good and proper quality for the said walling, at the rate of two shillings per perch, thirty-six cubic feet to the perch." It was contended that it was not necessary that it should be stamped, either because it was an agreement with an artificer for his hire or a memorandum relating to the sale of goods. But Williams, J., was of opinion that it fell between the two, and was something composed of both. "It is not," said he, "to work generally, but to do a particular kind of work. Neither is it for goods sold and delivered, but it is to work on a particular mass of stone" (*a*).

Decisions on Truck Act.

In deciding whether any particular case comes within the above exemptions in the Stamp Act, considerable assistance may be derived from the decisions upon the Truck Act, under which it has been held (*b*) that the term "artificer" does not apply to contractors or persons who speculate upon the state of the labour-market, but only to those who are actually and personally engaged or employed to do work. Where the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, the circumstance of his doing some portion of the work himself does not bring him within that statute. There must be a contract by which he *binds himself* to do it. On the other hand, the Truck Act applies to cases in which by the contract the personal labour of the artificer is to be given, although he may be at liberty also to procure the labour of others (*c*).

Criminal proceedings.

In prosecutions for embezzlement and other *criminal* proceedings, no objection can be taken on account of an agreement or other document being unstamped (*d*).

Mounsey v. *Stephenson.*

An agreement whereby one party agreed to pay the other a fixed salary, and the other agreed not to set up a chemist's shop within a certain distance, and the parties were mutually bound in a penalty of 600*l.*, to perform the agreement, has been held to be sufficiently stamped with a common deed-stamp of 1*l.* 15*s.* (*e*).

Messman to a regiment.

Whether or not an agreement by the officers of a regiment with their messman requires a stamp, must depend in great measure on the wording of it, but it would be prudent in all cases to have such an agreement stamped with an ordinary agreement-stamp of 2*s.* 6*d.*, as most probably it would not come

(*a*) *Hughes* v. *Budd*, 8 Dowl. 478; see *Poulton* v. *Wilson*, 1 F. & F. 403.

(*b*) *Riley* v. *Warden*, 2 Exc. 59; *Sharman* v. *Saunders*, 13 C. B. 166; *Ingram* v. *Barnes*, 7 E. & B. 115; *S. C.* 26 L. J., Q. B. 82, 319.

(*c*) *Weaver* v. *Floyd*, 21 L. J., Q. B. 151; *Bowers* v. *Lovekin*, 6 E. & B. 584; *S. C.* 25 L. J., Q. B. 371.

(*d*) 17 & 18 Vict. c. 83, s. 27.

(*e*) *Mounsey* v. *Stephenson*, 7 B. & C. 403.

within the exemption. In many cases he is more of a contractor than a servant.

2. INTERPRETATION OF THE CONTRACT.

ADMISSIBILITY OF PAROL EVIDENCE.

Parol evidence not admissible to vary written contract.

Where the agreement is such that it is required by the Statute of Frauds to be in writing, parol evidence is not admissible to show *verbal* alterations of it, for that would be a direct violation of the statute (*f*). And the law is the same where the agreement *is* reduced to writing, whether it be such an agreement as calls for a memorandum or not (*g*). Moreover, "it seems to be unnecessary to inquire what are the *essential* parts of the contract and what not, and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material" (*h*). Thus, where (*i*) a written agreement of hiring and service contained stipulations for *yearly* payments, evidence that a verbal agreement for *quarterly* payments had been made, was rejected, and the fact of quarterly payments having been made, was held not to vary the rights of the parties.

Every part of a written contract essential.

Giraud v. *Richmond.*

Parol evidence admissible to annex incidents.

But although, where parties agree that a particular instrument shall contain the terms of the contract, parol evidence cannot be given to add to or diminish those terms, yet it may be given to *annex incidents*, as it is termed (*k*).

Therefore, in all contracts of hiring and service, which do not, either expressly or by necessary implication from the terms used, exclude the custom of the particular trade, business or occupation, with reference to which the contract is made, parol evidence is admissible to show that by the custom of the trade, &c., the contract is liable to be put an end to by notice. The custom with reference to notice of course varies in different trades and occupations. But where a person hires a domestic servant, and nothing is said about notice, that, according to the custom of England, is a hiring for a year, with liberty to either party to put an end to the contract, by giving a month's notice. The above rule is illustrated by the following cases:—"Thus, where (*l*) the plaintiff entered into the defendant's service,

As to custom with regard to notice.

Johnson v. *Blenkensopp.*

(*f*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Stead* v. *Dawber*, 10 A. & E. 57.

(*g*) *Countess of Rutland's case*, 5 Rep. 25; and see *Lockett* v. *Nicklin*, 2 Exc. 93, 97. But this would not apply to a memorandum made by a third party of the terms of the hiring, so as to exclude parol evidence of those terms, *R.* v. *Wrangle*, 2 A. & E. 514.

(*h*) *Per* Parke, B., in *Marshall* v. *Lynn*, 6 M. & W. 117.

(*i*) *Giraud* v. *Richmond*, 2 C. B. 835.

(*k*) *Hutton* v. *Warren*, 1 M. & W. 475; see the cases collected in 1 Smith's L. C. 305, *et seq.*; and *Spartali* v. *Benecke*, 10 C. B. 212; *Lockett* v. *Nicklin*, 2 Exc. 93; *Syers* v. *Jonas*, 2 Exc. 111; *Metzner* v. *Bolton*, 9 Exc. 518; *Brown* v. *Byrne*, 3 E. & B. 703; *Hall* v. *Janson*, 4 E. & B. 500; *Cuthbert* v. *Cumming*, 10 Exc. 809; 11 Exc. 405; *Humfrey* v. *Dale*, 7 E. & B. 266; *Lucas* v. *Bristow*, 27 L. J., Q. B. 364.

(*l*) *Johnson* v. *Blenkensopp*, Tr. T. 1841, 5 Jur. 870.

under a written agreement, that he was to have 6*s.* a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing and to keep himself a pig, no poultry to be kept, his wife to keep the museum clean, he was to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful; to enter 12th May, 1838;" evidence was admitted to show that the plaintiff was, by custom, only entitled to a month's warning.

And in a settlement case (*m*), where a pauper signed the following agreement:—"Plate and dish workers. This day agreed with B. to serve Messrs. B. from the 11th day of November next until 11th November, 1817, at prices good out of oven as per opposite side. We agree to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants. Witness our hands, 10th day of January, 1815," evidence was held admissible to show that an universal custom prevailed amongst china manufacturers to allow holidays at certain fixed times of the year to the platers and dishers, and that at those times the latter could, notwithstanding the above agreement, absent themselves from their work without their master's permission. *R.* v. *Stoke-upon-Trent.*

Again, in (*n*) an action for wrongfully dismissing the editor of a newspaper, who had been engaged by letter, evidence was admitted to prove a custom that editors, sub-editors and reporters of newspapers were always engaged for a year, unless it were otherwise expressed at the time of making an engagement. *Holcroft* v. *Barber.*

And where the parties signed a "memorandum of agreement between H. Ibbetson and Co., of Leeds, of the first part, and R. A. Parker, of London, of the second part. The aforesaid R. A. Parker engages to serve the said H. Ibbetson and Co., as agent or representative, at the salary of 150*l.* per annum in consideration thereof. Also, provided, at the end of the year, the said H. Ibbetson and Co. find the said R. A. Parker has done sufficient business to justify them in recompensing, by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*:" it was held that the *Parker* v. *Ibbetson.*

(*m*) *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303. Observe, however, that in that case the dispute was between two parishes who were no parties to the agreement, and the question was whether the pauper had gained a settlement by hiring and service. In such cases parol evidence is always admissible to ascertain independent facts collateral to the written agreement. See *R.* v. *Laindon*, 8 T. R. 379; *R.* v. *Northwingfield*, 1 B. & Ad. 912; *R.* v. *Billinghay*, 5 A. & E. 676; and cas. cit. *ibid.*; see also 2 Phill. Ev. 355.

(*n*) *Holcroft* v. *Barber*, 1 C. & K. 4; and see *Baxter* v. *Nurse*, 1 C. & K. 13, where Tindal, C. J., in summing up to the jury, said, "There is no doubt that where there is a general understanding and a course of dealing, and agreements are made without any specific stipulations to vary them from such general course of dealing, they are included in it."

terms of the agreement did not exclude a general custom in the trade (defendants were woollen merchants), that either party might determine the service upon giving to the other a month's notice. And, also, that the question, whether or not the custom was excluded, was one for the court and not for the jury, though it was for the jury to find the existence or non-existence of the custom alleged. It was also held, that the 30*l.* to be given at the end of the year was a mere gratuity, for which no action would lie, and did not operate in any way to exclude the custom (*o*).

Parol evidence admissible to explain ambiguous terms.

Grant v. *Maddox*.

Upon similar principles, parol evidence is also held to be admissible to explain the meaning of terms used, where an ambiguity is raised by evidence as to the meaning of those terms (*p*).

Thus, where (*q*), by a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant engaged her *for three years*, and engaged to pay her a salary of 5*l.*, 6*l.* and 7*l.* per week in those years, parol evidence was admitted to show that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more *years*, actors were only paid during the theatrical *season*.

THE RELATIONSHIP CREATED BY THE CONTRACT.—PARTNER OR SERVANT.

How far arrangements for remunerating servant by portion of, or per centage on, profits, &c., make him a partner.

Arrangements are frequently made between masters in trade and brokers, clerks, travellers and other agents and servants employed by them, under which such persons, in lieu of receiving a fixed salary, are remunerated by a portion of the sums received by them on account of their master, or by a per centage on their earnings, or by a sum calculated with reference to the gross or net profits (*r*) of their master or principal, or some part of such profits, or in some similar method (*s*). These

(*o*) *Parker* v. *Ibbetson*, 27 L. J., C. P. 236; *S. C.* 4 Jur., N. S. 536.

(*p*) *Sotilichos* v. *Kemp*, 3 Exc. 105; *Smith* v. *Thompson*, 8 C. B. 44, 59.

(*q*) *Grant* v. *Maddox*, 15 M. & W. 737; and see *Smith* v. *Thompson*, 8 C. B. 44, where it was held to have been properly left to a jury to say whether the plaintiff, a clerk, had been guilty of a misappropriation of money intrusted to him by the defendant, his master, "*for business purposes*," in having applied part of it to the payment of his own salary.

(*r*) As to the meaning of the term "net proceeds," see *Caine* v. *Horsefall*, 2 Carr. & K. 349.

(*s*) When a plaintiff, by his particulars of demand, claimed the sum of 450*l.* for his services as clerk or manager to the defendant, from August, 1837, to October, 1839, inclusive, after the rate of 200*l.* per annum, but proved an agreement by the defendant that the plaintiff, who was manager of a bank, should have a certain per centage, by way of commission, on all business he should introduce: it was held, that the particulars were not sufficient to let in such a demand, and the defendant was strictly entitled to a nonsuit, but plaintiff had leave to amend on payment of costs. See *Harris* v. *Montgomery*, 11 C. B. 393; *S. C.* 2 L. M. & P. 425.

various modes of payment, which are generally adopted with a view to secure or increase exertion, often give rise to a question of considerable importance, viz., how far the persons whose services are to be so remunerated are to be regarded as partners, and not mere servants or agents in the business.

The first cases in which the question arose were cases in which objection was made to the admissibility of factors and brokers, whose remuneration was to be calculated in that way, as witnesses, on the ground of interest (*t*). Such persons, however, were held not to be disqualified on that ground, as they would have been had they been considered partners.

The exact point decided in these cases is not, indeed, likely to arise again, all objection to the admissibility of a witness, on the score of interest, having been removed by the legislature (*u*). But the question, whether an agreement of the description before referred to renders the person, whose services are to be remunerated in the manner above pointed out, a partner or a servant, still often arise. Those cases are, therefore, important, and are frequently referred to at the present day as authorities upon that subject.

As between the parties themselves. Servant not partner.

Where, indeed, the question arises *between the parties themselves*, the mere fact, that the servant was to be remunerated by a portion of the profits, will not alone constitute him a partner (*x*), if it appear from the whole scope of the agreement entered into, that the intention of the parties was to create the relationship of master and servant, and not that of partners.

Hesketh v. *Blanchard.*

Thus (*y*), where A., having neither money nor credit, offered the plaintiff that, if he would order with him certain goods to be shipped as an adventure, if any profit should arise from them the plaintiff should have one-half for his trouble: the plaintiff ordered the goods on their joint account, and paid for them, and A. having died without coming to a settlement, the plaintiff was held entitled to recover the amount from A.'s executors, and Lord Ellenborough said, "The distinction taken in *Waugh* v. *Carver* (*z*) applies to this case. *Quoad* third persons it was a

(*t*) *Dixon* v. *Cooper*, 3 Wils. 40; *Benjamin* v. *Porteous*, 2 H. Bl. 590.

(*u*) See stat. 3 & 4 Will. 4, c. 42, s. 26; 6 & 7 Vict. c. 85.

(*x*) In *Peacock* v. *Peacock*, 2 Campb. 45, Lord Ellenborough observed, "A man who renders himself liable to third persons as a partner may, in truth, be the mere agent or servant of his supposed co-partner, and entitled only to fixed wages.

(*y*) *Hesketh* v. *Blanchard*, 4 East, 144.

(*z*) 2 H. Bl. 335; *S. C.* 1 Smith's L. C. 491. In that case A. and B., ship-agents at different ports, entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. And it was held that they were liable, as partners, to all persons with whom either contracted as such agents, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own, Eyre, C. J., observing, that it was plain, upon the construction of the agreement between the parties themselves, that they were not, nor ever meant to be, partners; yet that

partnership; for the plaintiff was to share half the profits. But as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending A. his credit."

Wilkinson v. *Frasier.* And an agreement to divide the *produce* of a whaling voyage between the captain, officers and seamen, in certain proportions, has been held not to constitute them partners, so as to preclude one of the seamen from recovering his wages in an action against the captain (*a*).

Geddes v. *Wallace.* And so (*b*) the manager of a glass-work company enjoying an annual stipend, and also, by way of further remuneration, a share of the profits, calculated according to a proportion of capital and stock not advanced by him, but assigned by way of nominal interest, was held not to be a partner as between himself and the members of the company.

Partners.

Knowles v. *Haughton.* But where (*c*) A., a merchant and insurance broker, agreed to pay B. a certain salary for superintending his mercantile concerns, and also agreed "to allow Mr. B. one half of the profit arising from my account of insurances, from the commencement of the said account until the present period, or those that may hereafter be done," the parties, having acted on this agreement, were held to be partners in the insurance business.

Green v. *Beesley.* And where (*d*) the plaintiff agreed with the defendant to convey by horse and cart the mail between Northampton and Brackley at 9*l.* a mile per annum, and to pay his proportion of the expense of the cart, &c.; money received for the carriage of parcels to be divided between them, and the damage occasioned by loss of parcels, &c., to be borne in equal proportions, it was held that this agreement constituted a partnership, and not a mere measure of wages, and consequently that the plaintiff could not sue the defendant for the 9*l.* a mile.

Greenham v. *Gray.* And in the following case also the parties were held to be partners (*e*):—

"Memorandum of an agreement entered into between Messrs. R. Gray and L. Greenham, for carrying on the trade of cotton spinning and manufacturing at Mr. Gray's mills at Greenhill, Drogheda: Mr. Greenham to have the full control and management of the mill, and working of it to the extent he may think it advisable as it now stands, for the term of five years from 13th March, 1854, and to give his whole time and attention thereto, and not to enter into any other trade without the consent of Mr. Gray. Mr. Greenham is to direct and superintend all departments, from the purchases to the sales of all matters used and produced, or that it may be advisable to dispose of in or out of the mill or mill concern; and also the employment

they had made themselves such with regard to their transactions with the rest of the world.

(*a*) *Wilkinson* v. *Frasier*, 4 Esp. 182; and see *Mair* v. *Glennie*, 4 M. & S. 240; *Stocker* v. *Brockelbank*, 20 L. J., Ch. 401.

(*b*) *Geddes* v. *Wallace*, 2 Bligh, 270.

(*c*) *Knowles* v. *Haughton*, Lib. Reg. 1804, A. 1008; cited in Collyer on Partn. 17.

(*d*) *Green* v. *Beesley*, 2 Bing. N. C. 108; and see *Bond* v. *Pittard*, 3 M. & W. 357.

(*e*) *Greenham* v. *Gray*, 4 Ir. C. L. Rep. 501.

and dismissal of all parties required for, or connected with, the establishment of the D. Mill Co.; a regular set of accounts to be kept by a competent book-keeper, by double entry, who must furnish weekly and half-yearly accounts, and make out a proper balance sheet the first Monday in April, and first Monday in October, each successive half-year. Mr. Gray to charge for the mill and concerns as it now stands, that is all within the walls, together with the two dwelling-houses, a rent of 300*l.* per annum, over and above all head rents, insurance against fire at 7,000*l.*, stock in process included, together with all taxes on the premises, and with which rent of 300*l.* the concern is to be debited in account half-yearly when balancing the books. The machinery to be kept in equal repair at all times to that it now is in, the expense of which is to be duly charged in the mill accounts, as the amount may be paid. Should it be considered advisable to extend the business by buildings at G., and putting in additional machinery or otherwise, Mr. Gray is to charge interest for the capital he may sink in such buildings and machinery at 6*l.* per cent. per annum. And for the wear and tear of the machinery so put in, a sum to be deducted yearly by way of sinking fund, at a rate to be decided on; but for all the working capital that may be required for working the mill, as far as its present extent is capable, or to the greatest extent further buildings and machinery may be capable of and require, Mr. Gray is to supply such capital, and charge for the use of the same interest at the rate of 5*l.* per cent. per annum. Mr. Greenham is to be paid for his management, over and above his travelling expenses and other charges or costs he may incur for the benefit of the concern, 150*l.* per annum, to be paid monthly should he require it, and is to receive one-fifth part of the net profits half-yearly, and is to have for his private use one of the two mill dwelling-houses that he may make choice of, free of any charge whatever, to use in such manner as may best suit his convenience." Then followed a provision appointing an arbitrator, in the event of differences. *Greenham* v. *Gray.*

Greenham, claiming to be partner, brought an action for the hindrance offered by Gray to the plaintiff's fulfilling his contract, and for Gray's repudiation of the agreement. Gray contended that Greenham was not a partner, nor anything more than his manager or servant, and that he had misconducted himself as such, by asserting to different persons that he was a partner and not servant of Gray, and that for so doing Gray discharged him.

It was held by the Court of Exchequer in Ireland, though not without considerable doubt, that they were partners. Richards, B., said, "he had never met an instrument devised with greater ingenuity to hide what the parties really meant;" and added, "the distinction which has been taken between persons who are partners *inter se*, and those who are partners *quoad* third parties only, does not seem to me to be very applicable to what we have here to consider. True it is that persons may act so as to constitute themselves partners, and become liable to third persons while they are not partners, nor liable *inter se*, but that has reference to cases where the partnership

is worked out and attempted to be established by matter *in pais*, and is totally inapplicable here where the question is the construction of a document, and there cannot be one construction on this instrument in the case of persons who are partners, *quoad* third persons only, and another in the case of persons who are partners *inter se*. The instrument is very obscure."

Not partners. *Rawlinson* v. *Clarke*.

However, in the following case (*f*), the parties were held not to be partners. C. sold to R., and conveyed to him by deed his interest in the profession and practice of a surgeon, &c., carried on by him in P. Street, for 900*l*.—500*l*. to be paid on the execution of the deed, and 400*l*. at the end of a year. C. covenanted not to practise within three miles of P. Street, and also that, during one year from the date of the deed, he would reside in P. Street, and carry on the profession as before, and introduce R. to the patients, and promote the interest of the concern. In consideration thereof R. covenanted to allow C. during the year a moiety of the clear profits of the concern, to be paid at the expiration of the year. In an action of covenant brought by C. upon the deed, R. claimed to set off certain sums received by C. during the year from patients as money had and received to *his* use. Pollock, C. B., before whom the action was tried, refused to admit evidence of the receipt by C. of those sums, on the ground that the parties were partners during the first year. Upon which a bill of exceptions was tendered, and the Exchequer Chamber awarded a *venire de novo*, considering the parties were *not* partners, and that the evidence ought to have been admitted.

Stocker v. *Brockelbank*.

So, where (*g*) S. being entitled to certain letters patent for making lucifer match boxes, for a money consideration granted an exclusive licence to B. and Co. for the whole term, and by deed covenanted to serve B. and Co. as manager of the business for the same period, with power to B. and Co., in case of the bankruptcy or insolvency of S., or breach of the covenants on his part, to determine the engagement by notice in writing. B. and Co. covenanted with S. that they would diligently employ themselves in the business, and that S. should have the management thereof under their directions; that if S. should have duly observed the covenants, B. and Co. would pay him a gross sum of money at the expiration of the licence; and further, by way of salary, such a sum of money every quarter-day as should be equal to 40*l*. per cent. of the net proceeds of the business, and in case of S.'s death before, would pay his executors, during the remainder of the term, 30*l*. per cent. upon the net profits; and it was provided, that in case B. and Co. discontinued the business, S. should have the option of purchasing their interest in the licence, and the stock, &c., but that nothing therein contained should constitute S. a partner. After the business had been carried on for a time under this arrangement, B. and Co. discharged S. from being manager, on the ground of neglect, who thereupon filed a bill in the Court of Chancery for an in-

(*f*) *Rawlinson* v. *Clarke*, 15 M. & W. 292.

(*g*) *Stocker* v. *Brockelbank*, 20 L. J., Ch. 401; see also *Osborne* v. *Jullion*, 26 L. J., Ch. 6.

junction to restrain B. and Co. from excluding him from the management, and for an account. Lord Cranworth, V. C., granted the injunction, but upon appeal, the Lord Chancellor, Lord Truro, discharged the order, with costs, to be paid by S., upon the ground that there was no partnership, that it was simply a contract of hiring and service, the remuneration to be measured with reference to the amount of the profits of the business.

Andrews v. *Pugh.* Tailor's traveller.

Again, where both parties were tailors, and the defendant, who was employed as travelling agent for the plaintiff, to receive a commission of 15*l.* per cent. on the gross amount of profits, endeavoured to make out that he was a partner, Kindersley, V. C., held, that they were not partners *inter se*, whatever might have been the effect of their dealings as regarded third persons, and granted an injunction to restrain the defendant from receiving from any of the customers introduced by him to the plaintiff any sums of money on account of goods delivered or business done for them by the plaintiff, and from doing any act to hinder the plaintiff from so doing (*h*).

So in criminal cases. *Hartley's case.*

Similar principles have been acted on in criminal cases (*i*). Thus, it has been held, that a person employed by the owner of a colliery, as captain of one of his vessels, to take out coal and sell the same, and bring back the money to his employer, and who was remunerated for his labour, by allowing him two-thirds of the price for which he sold the coals above the price charged at the colliery, was a servant within the meaning of the statute 39 Geo. 3, c. 85, and having embezzled the price of some coal, he was convicted of larceny. All the judges holding that the mode of paying him for his labour did not vary the nature of his employment, nor make him less a servant, than if he had been paid a certain price per chaldron or per day.

Holmes' case.

So, where a clerk to a banking firm was to receive one-third of one of the partner's profits, being the fifteenth share of the whole profits of the house, to which the other partners assented, but they considered the clerk not liable to them for losses: it was held, that the clerk was not a partner. He was to receive only a sort of per-centage, and the agreement was assented to by the partners, merely as a private agreement between the one partner and the clerk. He was to receive a share of the *particular* profits of the one partner, and not of the *general* profits of the firm, and therefore he might be guilty of embezzling money received on behalf of the firm (*j*).

Anonymous.

So, where a prisoner was employed by the master of a coal vessel, who sent him with a cargo of coals, and the custom of the trade was for the person who superintended the business to receive two-thirds of the freight, and the owner one-third; the prisoner took the whole; whereupon he was indicted and convicted. It was objected, that he and the master were joint proprietors of the freight, but a large majority of the judges held the conviction right (*k*).

(*h*) *Andrews* v. *Pugh*, 24 L. J., Ch. 58.

(*i*) *R.* v. *Hartley*, Russ. & Ry. 139.

(*j*) *Holmes' case*, 2 Lewin, 256; Chambre, J., cited in 2 Russ. on Crimes, 170 (3rd edit.).

(*k*) Anonymous, *ibid.*, cited by Chambre, J.; see 2 Russ. on Crimes, 171.

R. v. *Wortley.* And where (*l*) W. engaged "to take charge of the glebe lands of C., his wife undertaking the dairy and poultry, at 15*s.* a-week till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and *a third of the clear annual profit*, after all expenses of rent and rates, labour and interest on capital, &c., are paid, on a fair valuation made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by W., who occupies it as bailiff, in addition to his salary:" it was held that W. was servant to C., and not a partner.

Tench v. *Roberts.* But in a case (*m*) where the plaintiff was clerk to the defendant, who was a solicitor, under an agreement "to become an assistant to R., and to take one-third part of the profits of the business by way and in lieu of a salary, not to be considered as a partnership, and R. agreed to allow T. the above for his share as an assistant," Sir John Leach, Vice-Chancellor, allowed a demurrer to a bill filed by T. for an account of salary, on the ground that this agreement substantially constituted a partnership, and was contrary to the policy of the statute 22 Geo. 2, c. 46, s. 11, which prohibited attornies allowing unqualified persons to practise in their names.

In re Jackson. And in another case (*n*), where an attorney engaged an unqualified person to conduct his business, and agreed to allow him a moiety of the profits of the business instead of a fixed salary, and the names of both of them were painted on the door of the office, and bills were made out in their joint names; Lord Tenterden ordered the attorney to be struck off the rolls, and the clerk to be sent to prison for a month.

As regards third persons. Where the question arises, not between the parties themselves but between one of them and a third person, a distinction of some nicety, and difficult of application to the circumstances of particular cases, has been established between cases in which the agreement was that the servant, &c. should be remunerated by a portion of the *net* profits; and cases in which the agreement was for a remuneration by a portion of the *gross* earnings, or produce, or by a sum of money calculated in proportion to the profits, or a given share of them. In the former of those cases he will be considered as a partner, so far as to be liable to third parties as such: it being a well-established principle, that whoever participates in the profits of a trade, or has a specific interest in the profits themselves as profits, becomes chargeable as a partner to third persons in respect of transactions arising out of the trade or particular adventure in the profits of which he is to participate (*o*). Whilst, in the latter cases, he will not be considered as a partner even with regard to third persons. This distinction will probably be regarded by the reader as one of considerable subtlety and refinement. It is, however, well established, and, though it has often elicited from judges and text-writers expressions of animadversion and regret, it has,

Distinction between servant receiving share of net profits,

and *gross* earnings or sum calculated with reference to profits.

(*l*) *R.* v. *Wortley*, 21 L. J., M. C. 44; *S. C.* 2 Den. C. C. 333; see *R.* v. *Walker*, 27 L. J., M. C. 207.

(*m*) *Tench* v. *Roberts*, 6 Madd. 145, note; see *Candler* v. *Candler*, *ibid.* 141.

(*n*) *In re Jackson*, 1 B. & C. 270.

(*o*) Gow on Partn. 13, 14.

nevertheless, been frequently acted upon in practice, and is thought, by some writers, at least, to rest on a very just and satisfactory foundation (*p*).

The distinction itself is well illustrated by the case of *Dry* v. *Boswell* (*q*). That was an action against B. for the repairs of a lighter. The witnesses first stated that the lighter was the sole property of A., who let her out to B., and he worked her, and that the two shared her *profits* equally between them. Upon which Lord Ellenborough, C. J., said, "In that case B. was to be considered a partner, and was jointly liable for the repairs done to the lighter. There was here a participation of profit and loss, which constituted a partnership." But the agreement with A. subsequently appeared to be that B., in consideration of working the lighter, should receive half her *gross earnings*, and that A., as owner, should receive the other half. Then Lord Ellenborough observed, that "this was only a mode of paying B. wages for his labour, and was different from a participation of profit and loss; so that, under these circumstances, no partnership could be considered as existing between him and the owner of the lighter." *Dry* v. *Boswell.*

This distinction was frequently recognized and acted upon by Lord Eldon, although he disapproved of it (*r*); and has also been recognized by other judges.

Thus where (*s*) an agreement was entered into between Mair, the owner of a ship, and Young, the master, that Young was to have in lieu of all wages, primage, &c., one-fifth share of the profit or loss of the intended voyage on ship and cargo, and was to follow Mair's instructions, do all the business himself that he could do, and for the rest make the best bargains he could. Lord Ellenborough said, there was "no pretence for saying that the captain was a partner, because his wages were *Mair* v. *Glennie.*

(*p*) 3 Kent Comm. Lect. 43, pp. 25, 33, 34 (4th edit.). See Story on Partn. ss. 36, 52; Cary on Partn. 11, note (*i*). Mr. Justice Story states that the Roman law fully recognized the same distinction; which is also well known and fully recognized in the French law. See Story on Partn. ss. 50, 51; and he adds, "This coincidence of doctrine, founded upon general reasoning between foreign jurists and the municipal jurisprudence of the common law as to the propriety of the distinction, certainly affords no slight confirmation of its accuracy and entire conformity to the true principles which ought to regulate the subject."

(*q*) 1 Campb. 329; and see *Wish* v. *Small*, 1 Campb. 331; *Gibbons* v. *Wilcox*, 2 Stark. 43.

(*r*) *Ex parte Hamper*, 17 Ves. 404, 412; *Ex parte Langdale*, 18 Ves. 300; *Ex parte Watson*, 19 Ves. 461; *Ex parte Rowlandson*, 1 Rose, 91; and see *Pott* v. *Eyton*, 3 C. B. 32; *Ex parte Chuck*, 8 Bing. 469.

(*s*) *Mair* v. *Glennie*, 4 M. & S. 240; and see *Stocker* v. *Brockelbank*, 20 L. J., Ch. 401, where Lord Truro treats the case of *Mair* v. *Glennie* as if it decided that Young was not a partner in the adventure. That was the opinion of the court, but it would seem to have been unnecessary for the decision of that case to express that opinion. The question there was, as stated in the text, as to the ownership of the *ship*. A similar observation applies to *Meyer* v. *Sharp*, 5 Taunt. 74.

to be regulated and paid by reference to a calculation on the profits of the adventure." However, it was sufficient for the decision of that case to hold that Young was not a partner in the *ship*.

Smith v. *Watson.*

But where (*t*) A. and B. agreed that A. should buy whalebone through B., as his broker, and that B., as a remuneration for his trouble, should receive one-fourth of the profits arising from the sale, and bear one-eighth of the losses, the Court of King's Bench inclined to the opinion that B. *was* a partner in the *profits*, so as to be liable to third persons; though it was not necessary to decide that point, the question in the case before the court depending upon whether or not B. was interested as a partner in the *whalebone*, which he was held not to be.

Pott v. *Eyton.*

The distinction above pointed out is well illustrated by the case of *Pott* v. *Eyton and Jones* (*u*). That was an action by the assignees of certain bankrupts to recover money paid by them on account of the defendants. The facts were shortly these:—In 1828, Eyton was concerned in a colliery at M., and an agreement was entered into between him and Jones for opening a tally-shop at M., (near the colliery,) principally with a view of supplying goods to the workmen at the colliery. Eyton built the shop, and his name appeared over the door and in the excise licences, and the invoices of goods supplied to the shop were made out in his name, and he paid for them. Jones managed the shop. The workmen at Eyton's colliery were supplied with goods from it, for which they settled at the colliery when their wages were paid until 1831 (*x*). From that time they paid at the shop once a fortnight. Jones paid over to Eyton the principal part of the money taken at the shop, as he paid for the goods, but reserved enough for small payments at the shop. Eyton received for his own use 7*l.* per cent. on the amount of all sales to his workmen, and Jones had all the rest of the profits. In 1834, the arrangements were changed. Jones was thenceforth to buy in his own name all goods supplied to the shop, and receive payment for all goods sold; and Eyton was to receive 5*l.* instead of 7*l.* per cent. on the amount of sales to his workmen. Eyton's name remained over the door till October, 1840, when a fire stopped the business. In 1834, when Jones began to buy goods, he opened an account with the bankrupts, who were bankers. The bank failed in 1839, when a balance exceeding 2,000*l.* was due to it on that account. Besides the shop at M., Jones, after 1834, opened three more at other places, which he carried on in his own name, on his own account, and supplied with goods from the shop at M. The action was brought against *both* Eyton and Jones to recover the amount due to the bankers. No evidence was given to show that credit was, in fact, given to Eyton by the bankers, or that they knew that his name appeared over the shop, or in the

(*t*) *Smith* v. *Watson*, 2 B. & C. 401; and see *Reid* v. *Hollinshead*, 4 B. & C. 867; *Cheap* v. *Cramond*, 4 B. & Ald. 670.

(*u*) 3 C. B. 32; and see *Barry* v. *Nesham*, 3 C. B. 641; *Heyhoe* v. *Burge*, 9 C. B. 431.

(*x*) When the truck system was abolished.

licences, or supposed him to be a partner, and the jury, at the trial, found that he had not shared profit and loss since 1834, when the account was opened, and had not been held out as a partner and his credit pledged to the bank, and gave their verdict for the defendants. And in the following term a rule for a new trial, on the ground that the verdict was against evidence, was discharged, Tindal, C. J., saying, (*y*) "It was contended that an actual partnership was proved; for that Eyton, by taking 5*l.* per cent. on the sales to his workmen, received a share of the profits, and was therefore, in point of law, a partner as to third persons. But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of profit and loss; but, as to third persons, they are partners if they share the profits of a concern: for he who receives a share of the profits receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them" (*z*). *Grace* v. *Smith* (*a*); *Waugh* v. *Carver* (*b*). But in the former of those cases, Lord Chief Justice De Grey, after laying down the rule of law in the terms which I have mentioned, proceeds: —"If any one advances or lends money to a trader, it is lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment." Afterwards he says, "I think the true criterion is to inquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits as a fund of payment,—a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits." So in the present case, the jury have said there was no agreement to share the profits. This distinction has been recognized in many cases, of which it may suffice to mention *Dry* v. *Boswell* (*c*) and *Benjamin* v. *Porteous* (*d*). And although, in *Ex parte Hamper* (*e*), Lord Eldon said the distinction was so thin that he could not state it as established upon due consideration, yet he acted upon it in that case; and again, in *Ex parte Watson* (*f*), where he said, "One who receives a salary not charged upon profits—according to a known though nice distinction—is not by that a partner." Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales. And it appears to us that, in the present case, the payment to Eyton was in the nature of commission on certain sales supposed to be effected through his influence over his workmen, and was not sufficient to render

(*y*) 3 C. B. 39.

(*z*) In *French* v. *Styring*, 2 C. B., N. S. 362, Cresswell, J., said, "That has been said ever since *Waugh* v. *Carver*, and some judges have pronounced it to be a very bad rule."

(*a*) 2 W. Bl. 998.

(*b*) 2 H. Bl. 235.

(*c*) 1 Camph. 329, *ante*, *p.* 41.

(*d*) 2 H. Bl. 590.

(*e*) 17 Ves. 404.

(*f*) 19 Ves. 459.

him, as a matter of legal inference, liable as a partner: and in so far as it was a question of fact, it was disposed of by the jury."

French v. *Styring.*

In the following case (*g*) the same question might have arisen, but was avoided by the construction put upon the acts of the parties. The plaintiff was a trainer of horses at Newmarket; defendant was a wine merchant at Huddersfield. In March, 1854, a racehorse called Census was jointly purchased by plaintiff and C. C. afterwards sold his share to M., and it was agreed between plaintiff and M. that plaintiff should keep the horse for the purpose of training him, and should have the entire control and management of him; that 35*s.* per week should be allowed as the expenses of his keep; that plaintiff should pay the expenses of entering the horse and conveying him to different races; that each of them should pay one-half of the horse's keep and other expenses, and that the winnings should be equally divided between them. M. having sold his share of the horse to defendant, the latter agreed with the plaintiff that he should continue to keep, train and manage him upon the same terms as had been agreed upon with M. The horse was entered and ran at several races, but never won anything, and having broke down, was sold for 20*l.* It was held that, even assuming this agreement to constitute a partnership between plaintiff and defendant, the former might recover from the latter a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for the defendant.

APPRENTICE OR SERVANT.

Whether the contract is one of apprenticeship, or of hiring and service,

Another question, which was formerly of more importance than it is at the present day (*h*), though even now it may often arise, is whether the agreement into which the parties have entered was intended to create the relationship of master and apprentice, or master and servant (*i*). In deciding this point more attention is now paid to the main object of the parties than to the language used by them (*k*). Formerly it was held that unless the word "apprentice" was used, the contract might be considered one of hiring and service (*l*). But the cases in which that doctrine was laid down and upheld have long been overruled (*m*), and each case is now held to depends on

(*g*) *French* v. *Styring*, 2 C. B., N. S. 357; see also *Hickman* v. *Cox*, 27 L. J., C. P. 127.

(*h*) Now that settlement by hiring and service is abolished, *ante*, p. 1, note (*b*). One great difference between an apprentice and a servant is that the latter may be dismissed for misconduct, whilst the former may *not* in general. See *Winstone* v. *Linn*, 1 B. & C. 460; *Wise* v. *Wilson*, 1 Carr. & K. 662; *Phillips* v. *Clift*, 4 H. & N. 168.

(*i*) See further on this point, Burn's Justice, tit. "Poor" (29th edit.) pp. 545, &c., and 651, &c.

(*k*) *R.* v. *Nether Knutsford*, 1 B. & Ad. 730.

(*l*) *R.* v. *Little Bolton*, 2 Bott. 316; *R.* v. *Eccleston*, 2 East, 298.

(*m*) *R.* v. *Rainham*, 1 East, 531; *R.* v. *Laindon*, 8 T. R. 379; *R.* v. *Crediton*, 2 B. & Ad. 493; *R.* v. *Great Wishford*, 4 A. & E. 223.

depend upon its own particular circumstances (*n*). If the parties appear to have contemplated the relation of master and apprentice, then the contract must be considered as one of apprenticeship (*o*), and if it be an imperfect apprenticeship it cannot be treated as a contract of hiring and service. If, on the other hand, it appear that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring and service (*p*). Where teaching and learning appear to be the primary object of the parties, although work is to be done for the master, the contract is to be considered as one of apprenticeship. But if working for the master appear to be the primary object, and teaching and learning the master's trade a mere secondary consideration, the existence of a stipulation by the master to teach, and a corresponding stipulation by the servant to learn, the master's trade will not alone prevent the contract from being considered one of hiring and service (*q*).

the intention of the parties.

TENANT OR SERVANT.

Where a servant occupies premises belonging to his master, as where a coachman occupies rooms over a stable, or a gardener an outhouse, or a gatekeeper a lodge in the park, or a porter a lodge at the park gate, and has on that account less wages, his occupation is in law the occupation of his master (*r*). And such servants, when dismissed from the service, have no right to continue in the occupation of their houses as tenants, nor are they entitled to notice to quit (*s*). So, under the law of settlement, the occupation of a tenement connected with and ancillary to the service, would not confer a settlement, though it would if wholly unconnected therewith (*t*). So a servant at an annual salary, who resided in two rooms within the walls of a light-house to take care of the light, was held not liable to be rated as occupier, his occupation being that of his master (*u*). But a servant was held liable to poor rate who took a house not belonging to his master, although his master paid the rent (*x*).

Tenant or servant. Servant occupying premises belonging to his master does not occupy as tenant,

nor is he liable to poor rates.

(*n*) *R.* v. *King's Lynn*, 6 B. & C. 99; *R.* v. *Edingale*, 10 B. & C. 739; *R.* v. *Northowram*, 9 Q. B. 24.

(*o*) *R.* v. *Bilborough*, 1 B. & Ald. 115; *R.* v. *Crediton*, 2 B. & Ad. 493; *R.* v. *Newton*, 1 A. & E. 238; *R.* v. *Great Wishford*, 4 A. & E. 216; *R.* v. *Ightham*, 4 A. & E. 937; *R.* v. *Northowram*, 9 Q. B. 24.

(*p*) *Per* Bayley, J., in *R.* v. *King's Lynn*, 6 B. & C. 99; see *R.* v. *Great Wishford*, 4 A. & E. 222; and *R.* v. *Northowram*, 9 Q. B. 24.

(*q*) *R.* v. *Crediton*, 2 B. & Ad. 497; *R.* v. *Billinghay*, 5 A. & E. 676; *R.* v. *Northowram*, 9 Q. B. 24.

(*r*) *Bertie* v. *Beaumont*, 16 East, 34; *R.* v. *Stock*, 2 Taunt. 329; *R.* v. *Rees*, 7 C. & P. 568; *St. Anne* v. *Linnæan Society*, 3 E. & B. 793; and see Cases of Burglary, 1 Russ. on Cr. 810.

(*s*) *Mayhew* v. *Suttle*, 4 E. & B. 347, *post*, p. 46.

(*t*) *R.* v. *Leacroft*, 2 M. & S. 472; *R.* v. *Minster*, 3 M. & S. 276; *R.* v. *Cheshunt*, 1 B. & Ald. 473; *R.* v. *Iken*, 2 A. & E. 147; *R.* v. *Terrott*, 3 East, 506; *R.* v. *Ponsonby*, 3 Q. B. 14; and cas. cit. Archbold's Poor Law, 574.

(*u*) *R.* v. *Tynemouth*, 12 East, 46.

(*x*) *R.* v. *Lynn*, 8 A. & E. 379; *R.* v. *Bishopton*, 9 A. & E. 824.

Mayhew v. *Suttle.*

Brewer's servant in beershop not a tenant.

Where S., a brewer, by an agreement, reciting that he was in possession of a messuage and premises whereon the sale of beer and porter had been for some time last past and then was carried on and conducted by U. for and on S.'s account, agreed that M. might from the date of the agreement enter into and upon the said premises, and carry on and conduct thereon such trade or business for S. in the place and stead, in the same manner, and with and upon the same privileges and terms as U. had theretofore done, until the agreement should be determined and put an end to by one month's notice on either side; and the agreement also contained stipulations that M. should take all his beer from S., and not part with the trade or premises without S.'s consent, and on receiving notice to put an end to the agreement should quietly give up possession of the premises, trade, fixtures, &c. without requiring any payment from S.: it was held both by the Queen's Bench and Exchequer Chamber to be abundantly clear that there was no relation between the parties but that of master and servant, and that M. could not maintain trespass against S. for entering without a month's notice, as he had no such possession as would enable him to maintain such action (*y*).

Servant cannot dispute master's title.

A servant who has been put into possession of a house or other premises by his master cannot of course dispute his master's title nor that of his master's devisee (*z*). If he wish to do so he must first give up possession (*a*).

Government servants *permitted* to occupy houses in part of salary entitled to vote;

but not if *required* to do so.

Officers and servants of government who are *permitted* to occupy houses belonging to government as part remuneration for their services may be considered as occupying as tenants within the Reform Act, 2 Will. 4, c. 45, s. 27, but not if they are *required* to occupy them with a view to the more efficient performance of their duties (*b*). But a hall-keeper to the guildhall of a borough who occupied a house (communicating with a yard at the back of the guildhall) which was originally built as a residence for and was always occupied by the hall-keeper for the time being, who was elected annually, and had the exclusive control of the house, and paid rates and taxes, but no rent, his occupation being considered as part payment for his services, and being necessary for the due discharge of his duties, was held to occupy as servant and not as tenant, and therefore not entitled to a vote (*c*).

Hall-keeper to guildhall of a borough.

GENERAL HIRING, YEARLY HIRING, &c.

A general hiring is a hiring for a year.

Where no time is limited either expressly or by implication for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law a hiring

(*y*) *Mayhew* v. *Suttle*, 4 E. & B. 347.

(*z*) *Doe* v. *Birchmore*, 9 A. & E. 662. This rule does not merely apply to ejectment; *Delaney* v. *Fox*, 2 C. B., N. S. 768.

(*a*) *Doe* v. *Baytup*, 3 A. & E. 188; *Doe* v. *Birchmore*, *ubi supra.*

(*b*) *Hughes* v. *Chatham*, 5 M. & G. 54; *Dobson* v. *Jones*, *ibid.* 112.

(*c*) *Clarke* v. *Bury St. Edmunds*, 1 C. B., N. S. 23; 26 L. J., C. P. 12.

for a year (*d*). This rule is applicable to all contracts of hiring and service, whether written (*e*) or unwritten, whether express or implied, and whatever be the nature of the service; and is not confined to servants in husbandry, but extends also to domestic (*f*) and other servants, such as clerks and others (*g*). But it is not an inflexible rule, and does not apply where the contract contains stipulations inconsistent with the application of it, or where from some well-known custom upon the subject the parties may be considered to have contracted with reference to such custom, and thus to have excluded its application (*h*). And as we shall presently see, a yearly hiring may in general be terminated by giving the customary notice.

But the rule only applies where there has been a contract of hiring, either express or implied.

Nor does the rule apply to cases in which there has been a service, but *no contract* of hiring, and no circumstances from which a contract can be implied (*i*); and therefore where (*k*) an assistant-surgeon brought an action against his employer for the amount of salary due to him, and no specific contract of hiring was proved, but evidence was given of the service, and it appeared that after the plaintiff had been some time in the defendant's service he was taken ill and went to the hospital, and never returned nor was asked to return to his employment, and that he had been paid different sums of money, but not at any fixed or definite periods: although it was contended on the part of the defendant that the evidence showed a yearly hiring, and therefore that the plaintiff, having left his situation before the end of the year, could not recover any part of his salary, yet it was held that there was no evidence to show a hiring for a year, and the plaintiff recovered for the time he had actually served.

Bayley v. *Rimmell.*

When contract cannot be implied.

And a contract of hiring cannot be presumed where the circumstances tend rather to rebut such a presumption, as where paupers have been taken to live with their relatives or others out of charity (*l*), or where the agreement was for cohabitation and not merely for service (*m*).

Where service performed contract presumed.

But where there has been *a service* for more than a year, and wages paid without any express contract of hiring, it may be presumed that such service was under a *contract* for a *yearly hiring* (*n*).

(*d*) Co. Litt. 42 b; *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Lilley* v. *Elwin*, 11 Q. B. 742. There is scarcely a case upon the subject of settlement by hiring and service in which this rule is not admitted; and it is never denied in any one of them.

(*e*) See *Elderton* v. *Emmens*, 4 C. B. 479; 6 C. B. 175, 176; 13 C. B. 495.

(*f*) See *R.* v. *Worfield*, 5 T. R. 506.

(*g*) *Hutman* v. *Bulnois*, 2 C. & P. 511.

(*h*) *Baxter* v. *Nurse*, 6 M. & G. 935; and see *post*, p. 48.

(*i*) As there were in *Beeston* v. *Collyer*, 4 Bing. 313.

(*k*) *Bayley* v. *Rimmell*, 1 M. & W. 506; and see *Broxham* v. *Wagstaffe*, 5 Jurist, 845.

(*l*) *R.* v. *Pitminster*, 2 Bott. 269; *R.* v. *Weyhill*, 2 Bott. 271; Burr. *S. C.* 491; 1 W. Bl. 206; *R.* v. *Stokesley*, 6 T. R. 757; *R.* v. *Rickinghall*, 7 East, 373; *R.* v. *Sow*, 1 B. & Ald. 178.

(*m*) *R.* v. *Northwingfield*, 1 B. & Ald. 912; *Bradshaw* v. *Hayward*, Carr. & M. 591.

(*n*) *R.* v. *Lyth*, 5 T. R. 327; *R.* v. *Long Whatton*, 5 T. R. 447; *R.* v. *Pendleton*, 15 East,

Where contract for indefinite time, *yearly* hiring presumed.

And so where there *has* clearly *been a contract*, but not for any definite time, a *yearly* hiring may be inferred (*o*), and slight circumstances, such as an agreement to find clothes (*p*), will strengthen that inference. And, if the bargain be originally made for an entire year, but there is also a provision that, in a given event, it shall be competent to the parties, or either of them, to put an end to or suspend the service for a part of the year, the mere existence of this condition will not render it the less a hiring for a year; a conditional hiring being the same, for most purposes, as an absolute hiring until the condition is acted upon (*q*).

Conditional hiring.

Baxter v. *Nurse.*

And this presumption, that a general hiring is a hiring for a *year*, may be greatly strengthened, where there appears to be some general custom applicable to the particular trade, business or occupation in which the servant is engaged to hire such servants by the year, and evidence of such custom is always admissible (*r*). Thus, where (*s*) the plaintiff was engaged by the defendant, at a weekly salary, to edit a *new* periodical publication, evidence was admitted, on the part of the plaintiff, to show that it was the custom, in the case of editors and other persons regularly employed on newspapers, to engage them for the whole year. But as it did not appear that the custom applied to new publications, the jury found a verdict for the defendant, on the ground that the plaintiff was not hired for a year, and an application for a new trial was refused (*t*).

Presumption of yearly hiring, when excluded by terms.

The presumption that a general hiring is a yearly hiring cannot, however, be made where it is excluded by the terms of the contract. If either party, for instance, is at liberty to determine the service at any time, the hiring cannot be considered a yearly hiring (*u*). Or if the hiring be expressly for less than a year (*x*), although done purposely to avoid the consequences of a yearly hiring (*y*). Or if the master have not the entire control of the servant during the year, although he pay the servant yearly wages, as if the servant is at liberty, when not engaged for his master, to work for other people (*z*).

449; see *R.* v. *St. Martin, Leicester*, 8 B. & C. 677.

(*o*) *R.* v. *Macclesfield*, 3 T. R. 76; *R.* v. *Ardington*, 1 A. & E. 260; *R.* v. *Newton*, 10 B. & C. 838.

(*p*) *R.* v. *Worfield*, 5 T. R. 506.

(*q*) *R.* v. *Byker*, 2 B. & C. 114; *R.* v. *Ossett cum Gawthorpe*, 4 B. & Ad. 216; *R.* v. *St. Helen's, Auckland*, 4 B. & Ad. 718; *R.* v. *Walbottle*, 9 Q. B. 248; *R.* v. *Sandhurst*, 7 B. & C. 557; and see *R.* v. *Herstmonceaux*, 7 B. & C. 551.

(*r*) It must be proved by instances, and cannot be supported by evidence of opinion merely, *Cunningham* v. *Fonblanque*, 6 C. & P. 44.

(*s*) *Baxter* v. *Nurse*, 1 Carr. & K. 10; and see *Holeroft* v. *Barber*, 1 C. & K. 4.

(*t*) 6 M. & G. 638; and see *Williams* v. *Birne*, 7 A. & E. 177.

(*u*) *R.* v. *Great Bowden*, 7 B. & C. 249, *et cas. cit. ib.*

(*x*) *Dunsford* v. *Ridgwick*, 2 Salk. 535; *R.* v. *Standon Massey*, 10 East, 576. But a hiring from Whitsuntide to Whitsuntide, although less than 365 days, was held sufficient hiring for a year to confer a settlement; *R.* v. *Ulverstone*, 7 T. R. 564.

(*y*) *R.* v. *Mursley*, 1 T. R. 694; *R.* v. *Coggeshall*, 6 M. & S. 264.

(*z*) *R.* v. *Polesworth*, 2 B. & C. 715; *R.* v. *Lydd*, 2 B. & C. 754; *R.* v. *Kilhingholme*, 10 B. &

Or if the agreement be to do work by the job, as to make 70,000 bricks at a certain price, this cannot be considered a yearly hiring, for although the job may last beyond the year, it does not necessarily last so long (*a*). So of hiring to work by the piece or gross (*b*). But if the hiring be for a year, a mere stipulation for payment by piece-work will not render it less a yearly hiring (*c*). Job work. Piece-work.

And so if any portion of the year, however short, is *excepted* during which the servant is not under his master's control, whether that exception be expressed or by necessary implication from the terms used (*d*), the hiring cannot be considered a hiring for a year, so as to confer a settlement, although the contract be for a year's service, subject to such exceptions. Thus, where a man was hired for a year, with liberty to let himself for the harvest month to any other person (*e*), it was held that he could not gain a settlement by service under such a hiring. So where the servant agreed for liberty to be absent eleven days during the sheep-shearing season (*f*), or during the sheep-shearing season (*g*), or to work shearman's hours and be at liberty at all other times (*h*), or as a colt shearman, to work twelve hours each day (*i*); or where the hiring was for a year from Michaelmas, to go away a month at harvest, and make up the time after Michaelmas (*k*); or where a bricklayer hired himself for three years, but he was to work only during certain hours each day (*l*), and in case of frost was to have no wages, but to be at liberty to serve another master (*m*); or where pay Saturdays and Sundays were excluded from the days on which the servant was to work (*n*); or Sundays only, for a hired servant is always under the government, discipline and control of the master, even on Sundays (*o*); or where it was agreed that the servant should have a holiday to go to his feast (*p*); or a Cases of exceptive hiring.

C. 802. But if the master have the *entire control* during the year, it is no objection that it is given him by *several contracts*; *R.* v. *Ravenstonedale*, 12 A. & E. 73.

(*a*) *R.* v. *Woodhurst*, 1 B. & Ald. 325.

(*b*) *Trinity* v. *St. Peter's in Dorchester*, 1 W. Bl. 443.

(*c*) *King's Norton* v. *Cambden*, 2 Str. 1139; *R.* v. *Birmingham*, Cald. 77; Doug. 333.

(*d*) *R.* v. *Gateshead*, 2 B. & C. 117 *n*, as explained in *R.* v. *St. Helen's, Auckland*, 4 B. & Ad. 726; and see *R.* v. *Walbottle*, 9 Q. B. 259.

(*e*) *R.* v. *Bishop's Hatfield*, 2 Bott. 211; *R.* v. *Althorne*, 2 B. & C. 112.

(*f*) *R.* v. *Empingham*, 2 Bott. 217; Burr. S. C. 791.

(*g*) *R.* v. *Arlington*, 1 M. & S. 622.

(*h*) *R.* v. *Buckland Denham*, Burr. S. C. 694.

(*i*) *R.* v. *North Nibley*, 5 T. R. 21.

(*k*) *R.* v. *Turvey*, 2 B. & Ald. 520.

(*l*) *R.* v. *Edgmond*, 3 B. & Ald. 107; see *R.* v. *Northowram*, 9 Q. B. 24.

(*m*) See *R.* v. *Martham*, 1 East, 239; that the mere stipulation to stop wages in bad weather would not make a hiring exceptive.

(*n*) *R.* v. *Cowpen*, 5 A. & E. 333.

(*o*) *R.* v. *Kingswinford*, 4 T. R. 219; *R.* v. *North Nibley*, 5 T. R. 21.

(*p*) *R.* v. *Threkingham*, 7 A. & E. 866.

pensioner two days in each half-year to go for his pension (*q*); or where there was a stipulation that each man should on each *working day* do a full day's work, and that he should not leave the pit till that work was completed, or should forfeit 2*s.* 6*d.*; as it was, therefore, stipulated by implication that the men were not to be under the control of the master on days which were not working days, nor on any day as soon as the day's work was completed (*r*).

Hours of work limited.

Upon the same principle it was also held, that if the *hours* of working were limited, the hiring, although otherwise for a year, could not be considered a yearly hiring for the purpose of conferring a settlement (*s*). But those principles were held not to apply where the limitation of hours was merely for the purpose of regulating the amount of wages (*t*), or where the agreement was to obey the rules of the factory with regard to hours, &c., as that was merely equivalent to an agreement to obey the master's orders, which is implied in every contract (*u*). And exceptions, merely *implied* by custom or usage of trade, were held not to prevent a settlement (*x*).

Exceptions implied by custom.

Reservation of weekly wages. Weekly hiring.

Where the only circumstance from which the intended duration of a contract of hiring and service can be inferred is the reservation of wages weekly, it must be taken to be weekly hiring. As where a man hired himself to a plumber and glazier, who was to find him board, lodging and washing at 6*s.* per week, summer and winter (*y*); or where the hiring was merely at so much a week (*z*); or where the servant was to live with his master, who was to find him board and lodging, and pay him 2*s.* 6*d.* a week (*a*); or where a servant in husbandry was to serve for the weekly wages of 4*s.*, board, washing and lodging, except in the harvest month, when his wages were to be increased to 10*s.* 6*d.* per week, and then again reduced to 4*s.* (*b*); or where the hiring was at 8*s.* a week, and two guineas for the harvest, to do anything the gardener should set him about (*c*);

(*q*) *R.* v. *Over*, 1 East, 599.

(*r*) *R.* v. *Gateshead*, 2 B. & C. 117 *n*, as explained in *R.* v. *St. Helen's, Auckland*, 4 B. & Ad. 726; *R.* v. *Walbottle*, 9 Q. B. 259; see *R.* v. *Byker*, 2 B. & C. 114.

(*s*) *R.* v. *Birmingham*, 9 B. & C. 925; *R.* v. *Frome Selwood*, 1 B. & Ad. 207; *R.* v. *Norton Bavant*, 3 A. & E. 161; *R.* v. *Holbeck*, 4 Q. B. 590; *R.* v. *Preston*, 4 Q. B. 597.

(*t*) *R.* v. *Ossett cum Gawthorpe*, 4 B. & Ad. 216.

(*u*) *R.* v. *St. John, Devizes*, 9 B. & C. 896. But see *R.* v. *Preston*, 4 Q. B. 597, where the hours were limited by a printed notice, with reference to which the agreement was made.

(*x*) *Per* Lord Mansfield in *R.* v. *Buckland Denham*, Burr. *S. C.* 694; *per* Bayley, J., in *R.* v. *Edgmond*, 3 B. & Ald. 110; and see *R.* v. *Stoke-upon-Trent*, 5 Q. B. 303.

(*y*) *R.* v. *Dedham*, Burr. *S. C.* 653; 2 Bott. 292.

(*z*) *R.* v. *Newton Towey*, 2 T. R. 453; *R.* v. *Odiham*, 2 T. R. 622; *R.* v. *Hanbury*, 2 East, 423; *R.* v. *Mitcham*, 12 East, 351; see also *Baxter* v. *Nurse*, 6 M. & G. 638; *ante*, p. 48.

(*a*) *R.* v. *Pucklechurch*, 5 East, 382.

(*b*) *R.* v. *Dodderhill*, 3 M. & S. 243.

(*c*) *R.* v. *Lambeth*, 4 M. & S. 315.

or where a gardener having asked 20*l.* a year, his master refused that, but agreed to give him so much a week (*d*).

Aliter, where

But if there is anything in the contract of hiring to show that it was intended to be for a year, the reservation of weekly wages will not control it. As where the hiring was at 3*s.* per week *the year round*, with liberty to go on a fortnight's notice, this was held to be a yearly hiring (*e*). So where the hiring was at weekly wages, with a stipulation for a month's notice to determine the contract, on the ground that it was a hiring of which no certain portion of time could be predicted for its duration, it was consequently a general hiring, which the law says is a hiring for a year (*f*).

fortnight

or month's notice required.

Yearly hiring cannot be terminated before the end of the year.

Where the hiring is a yearly hiring, it cannot, in general, be put an end to by either party before the end of the year. If, therefore, on the one hand, a master wrongfully dismiss his servant during the year, the servant may maintain an action against him for such wrongful dismissal, and a jury would, in some cases, be justified in assessing his damages at the amount of wages which he would have earned had he been allowed to serve to the end of the year (*g*). Whilst, on the other hand, a servant wrongfully quitting his master's service, or rightfully dismissed for misconduct, during the year, cannot recover any wages for the portion of the year during which he has served (*h*).

Down v. *Pinto*.

Where the defendant having established smelting works at Carthagena, in Spain, offered to employ the plaintiff as foreman, by letter, containing the following passages:—"I should require you to enter into an engagement to remain with me for, at least, *three years*, *at my option;* salary, 250*l.* per annum." It was held, that this did not enable the defendant to put an end to the service at his will, but that it was a yearly hiring, with an option for the defendant to require the plaintiff's service for three years, or to put an end to it at the expiration of the first, second or third year (*i*).

In the absence of any stipulation or custom as to notice.

The above-mentioned rule is, however, subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom (evidence of which, as we have already seen, is in all cases admissible if not inconsistent with the contract), enabling either party to deter-

(*d*) *R.* v. *Warminster*, 6 B. & C. 77.

(*e*) *R.* v. *Birdbrooke*, 4 T. R. 245.

(*f*) *R.* v. *Hampreston*, 5 T. R. 205; *R.* v. *Great Yarmouth*, 5 M. & S. 114; *R.* v. *Pershore*, 8 B. & C. 679.

(*g*) See *Beeston* v. *Collyer*, 4 Bing. 309. The action for wrongful dismissal is treated of, *post*.

(*h*) *Spain* v. *Arnott*, 2 Stark. 256; *Turner* v. *Robinson*, 6 C. & P. 15; *S. C.* 5 B. & Ad. 789; *Ridgway* v. *Hungerford Market Company*, 3 A. & E. 171; *Lilley* v. *Elwin*, 11 Q. B. 742.

(*i*) *Down* v. *Pinto*, 9 Exc. 327. In *Cook* v. *Paxton*, 33 L. T. 109, under an agreement by the Army Works Corps, to be subject to the Mutiny Act and the Articles of War, and which also contained a stipulation as to notice to quit, the men were considered only to be entitled to notice according to the agreement, and not to a formal discharge such as is contemplated by the Mutiny Act.

mine the contract by notice. In such cases, if the contract is determined by a notice, in accordance with the custom, the servant is entitled to recover wages for the fractional portion of the year during which he has served.

Domestic servants, month's warning or month's wages,

Thus, in the case of domestic and menial servants, with regard to whom there is a well-known rule, founded solely on custom, that their contract of service may be determined *at any time* by giving a month's warning or paying a month's wages (*k*), if their contract of hiring is so determined, they are entitled to a proportionate amount of wages for the time they have served.

wrongfully quitting forfeit all wages, not merely month.

But it is conceived to be perfectly clear, notwithstanding a notion to the contrary, which is believed to be not uncommon, that a domestic or other yearly servant wrongfully quitting his master's service forfeits all claim to wages for that part of the current year during which he has served, and cannot, after having wilfully violated the contract according to which he was hired, claim the sum to which his wages would have amounted had he kept his contract, merely deducting therefrom one month's wages.

This, at first sight, may appear rather harsh to some; but it is believed to be not only the law, but far more consistent with common sense and common honesty than to allow a man, at one and the same moment, to break a contract and claim a benefit under it, especially when, upon merely giving notice to his master, and paying (or agreeing to allow his master to deduct from the amount due to him) a month's wages, he could leave at any time, and the practical effect of adhering to the strict letter of the law is merely to compel the servant to give his master notice when he wants to leave, which can be but little trouble to him, and will, in most cases, save the master a great deal of unnecessary inconvenience and trouble, and sometimes loss.

Who are within rule as to menial servants.

No general rule can be laid down as to who do and who do not come within the category of domestic or menial servants. Each case must depend upon its own circumstances. But it has been held (*l*) that a head gardener, at 100*l.* a year, who resided in a detached house belonging to his master, was a menial servant, and only entitled to a month's warning. And a jury of the county of Surrey have held (*m*) that a gentleman was not justified in giving only a month's notice to a farm bailiff, and gave a verdict for a year's wages. And the Court of Exchequer has held (*n*), so far as the question is to be treated as a matter of law, that a governess, at 60*l.* a year and board and lodging, does not fall within the rule by which a menial or domestic servant may be discharged with a month's notice or a month's wages. The position which she holds, the station she occupies in a family, and the manner in which such a person is

Gardener is.

Farm bailiff not.

Governess not.

(*k*) *Fawcett* v. *Cash*, 5 B. & Ad. 908; *Beeston* v. *Collyer*, 4 Bing. 313; and see *Williams* v. *Birne*, 7 A. & E. 183; *Metzner* v. *Bolton*, 9 Exc. 519, 520.

(*l*) *Nowlan* v. *Ablett*, 2 Cr. M. & R. 54; see *Johnson* v. *Blenkinsopp*, 5 Jur. 870, *ante*, p. 32.

(*m*) *Louth* v. *Drummond*, Kingston Spring Assizes, 1849 (see *Times*, March 28), *coram* Parke, B., who left it to the jury.

(*n*) *Todd* v. *Kerrich*, 8 Exc. 151; *S. C.* 22 L. J., Exc. 1.

usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold. The same may be said of a tutor. But in these and similar cases an arrangement should be made at the time of hiring as to the notice expected or required, or intended to be given. Tutor.

In cases to which the custom applicable to domestic servants does not apply, and in which no specific agreement has been made as to the notice to be given for the purpose of determining the contract, that question must be determined by the custom applicable to the particular trade or calling with reference to which the service is to be rendered. Thus evidence has been admitted of a usage of trade enabling a master to dismiss a commercial traveller, at 150*l.* a year, upon giving three months' notice; and the plaintiff having declared upon the contract as an absolute contract for a year's hiring, was defeated upon its appearing, upon his own cross-examination, that the contract was defeasible by custom (*o*). Evidence has also been admitted of a custom in the woollen trade to dismiss an agent at a month's notice (*p*). And in *Mortimer* v. *Prowett* (*q*), evidence was given to show that, where no condition was expressed in the agreement of hiring, it was usual to give a printer (newspaper) one month's, or at least a fortnight's notice, a publisher three months, and a sub-editor to the end of the current year, and the jury gave the plaintiff, who filled all these places, one month's wages. Custom applicable in other cases. Commercia traveller three months. Agent in woollen trade one month. Newspaper printer, &c.

By analogy to the rule which prevents a yearly tenancy from being determined before the end of the year, it is sometimes contended that particular yearly hirings can only be determined in a similar manner. This point will, in most cases, depend upon the custom of the trade or business in question. But where a schoolmaster was appointed, by trustees of a school, on the following (among other) terms:—"The trustees shall pay you at the rate of 55*l.* per annum, and no more, so long as, by mutual consent, you shall retain the office of master," &c., "the appointment to be subject to termination by three months' notice from either party," it was held that the three months need not terminate with the year (*r*). And Coleridge, J., in holding the analogy of tenants from year to year not to be applicable to the case, said—"Nothing is said in the resolution or letter that the notice is to be given to terminate at the end of a year. No doubt there is a rule, with respect to tenants of land from year to year, that a notice to quit must be to quit at the end of a complete year. But no authority has been adduced to show that such a rule is applicable to notices to quit in all cases. In the case of land, there would be great inconvenience, arising from the nature of the property and the course of husbandry, to allow the relation of landlord and tenant to be terminated at any time; but with regard to a school, it must be of Analogy to tenancy from year to year held not applicable. Reason.

(*o*) *Metzner* v. *Bolton*, 9 Exc. 518.

(*p*) *Parker* v. *Ibbetson*, 27 L. J., C. P. 236; *ante*, p. 33.

(*q*) Q. B., Nisi Prius, June 18, 1856.

(*r*) *Ryan* v. *Jenkinson*, 25 L. J., Q. B. 11.

great importance that a master, who has done some act not sufficient to justify immediate expulsion, should not be allowed to continue in his office until the expiration of the current year. It seems, therefore, to me, that the trustees are justified in giving a three months' notice to terminate the schoolmaster's holding at any time during the year.

HOW FAR THE MASTER IS BOUND TO FIND WORK FOR THE SERVANT.

Contract to find work cannot be implied from contract to pay wages.

Where the contract of hiring merely contains an undertaking on the part of the master to pay certain stipulated wages, in proportion to the work done by the servant, there is no implied obligation on the part of the master to find work, so as to enable the servant to earn wages.

Williamson v. *Taylor.* Agreement with colliers.

Thus, where (*s*) the defendant, who was the owner of a colliery, entered into an agreement with the colliers and workmen, and amongst others the plaintiff, whereby the said owner retained and hired the said other parties thereto "to hew, work, fill, drive, and put coals and do such other work as may be necessary for carrying on the said colliery as they shall be required or directed to do by the said owners, or their viewers or agents, at the respective rates and prices, and on the terms," &c. following: —"First. The said owners agree to pay the said hereby hired parties once a fortnight, upon the usual and accustomed day, the wages by them to be earned, at the following rates, viz."—(specifying the rates, with regulations as to the manner of working.) "Fifth. The said parties hereby hired shall, during all the times the pit shall be laid off work, continue the servants of the said owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit. Sixth. The said hewers hereby hired shall, when required, except when prevented by sickness or other sufficient unavoidable cause, do and perform a full day's work on each and every working day, or such quantity of work as shall be fairly deemed equal to a day's work, not exceeding eight hours, and shall not leave their work until such day's work, or quantity of work, is fully performed or finished to the extent of each man's ability; and in default thereof, each of the said parties hereby hired and so making default shall, for every such default, forfeit and pay to the said owners 2*s.* 6*d.* The pit to commence coal work at such times in the morning as shall be required to suit the trade." Then followed other clauses not material here. It was held that the agreement contained no promise on the part of the defendant to employ the plaintiff at reasonable times for a reasonable number of working days during the term, and that no action would lie against the defendant for not doing so, although the plaintiff was thereby unable to earn wages.

But wages must nevertheless be paid if agreed on.

But where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it

(*s*) *Williamson* v. *Taylor*, 5 Q. B. 175; and see *Lees* v. *Whitcomb*, 5 Bing. 34; *Sykes* v. *Dixon*, 9 A. & E. 693; and other converse cases, *ante*, p. 25.

is optional on the part of the master to find work, and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed on, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give (*t*).

Aspdin v. *Austin.*

Thus, where the plaintiff agreed to manufacture for the defendant, with the materials and machinery to be provided by him, cement of a certain quality, and, on condition of his doing so, the defendant agreed to pay the plaintiff weekly 4*l.* for two years, and 5*l.* weekly for the following year, and then to receive him as a partner; the plaintiff also further agreed to teach the defendant how to manufacture certain kinds of cement. Each party bound himself in a penal sum to fulfil the agreement, and the defendant afterwards covenanted by deed for the performance of the agreement on his part. It was held that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, although the defendant was bound by express words to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part (*u*).

Dunn v. *Sayles.*

And where (*x*) a declaration stated, that by deed between the defendant D. and the plaintiff, the plaintiff covenanted that D. should, for five years from the date, serve the defendant in the art of a surgeon dentist, and attend for nine hours each day, and the defendant, in consideration of the services to be done by D., covenanted with the plaintiff that he, the defendant, would, during the five years (in case D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise), pay D. 35*s.* per week for the first year, 2*l.* per week for the second and third, and 2*l.* 2*s.* per week for the fourth and fifth; that D. was in the service for some time after the making of the deed till dismissed, and during all that time faithfully performed service, &c., and was willing and tendered to perform, &c. to the end of the five years, but the defendant, during the term, refused to permit D. to remain in his service, and dismissed him. It was held, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach.

Elderton v. *Emmens.* Solicitor to a Company at a salary.

And where (*y*) the plaintiff was appointed permanent solicitor to a joint stock company, at a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for business transacted by him for the company, for which salary he was to advise and act for the company on all occasions in all matters connected

(*t*) We shall see hereafter that a servant in such case cannot, if discharged by his master, recover the wages agreed on by offering to serve and remaining idle, but only damages for the wrongful discharge.

(*u*) *Aspdin* v. *Austin*, 5 Q. B. 671; see *Rust* v. *Nottidge*, 1 E. & B. 99; *Burton* v. *Great Northern Railway Company*, 9 Exc. 507; *Sharp* v. *Waterhouse*, 27 L. J., Q. B. 70.

(*x*) *Dunn* v. *Sayles*, 5 Q. B. 685.

(*y*) *Elderton* v. *Emmens*, 6 C. B. 160; In Dom. Proc. 13 C. B. 495.

with the company, with certain exceptions, it was held by the House of Lords, affirming the judgment of the Exchequer Chamber (*z*), that the agreement created the relation of attorney and client, and that the company was bound to continue that relation at least for a year, or pay the plaintiff his 100*l.*; but the company was not bound to supply the plaintiff with business as an attorney and solicitor at all events, or to require his services as attorney or solicitor whenever they had occasion for the advice or services of an attorney or solicitor.

Agreement to find work implied.

Pilkington v. *Scott.*

However, where the contract of hiring is capable of such a construction, the courts seem disposed to imply an agreement on the part of the master to find work, if that is necessary, to enable the servant to earn wages. Thus, in *Pilkington* v. *Scott* (*a*), it was held that stipulations in an agreement whereby a workman was to be paid by the piece, that his masters should pay him a moiety of his wages during any depression of trade, and might dismiss him on giving him a month's wages or a month's notice, distinguished the case from that of *Aspdin* v. *Austin*, and that, looking at the whole of the agreement, the master was bound to employ the servant in the sense of finding him actual employment, so as to enable him to earn wages, subject to the condition of notice. And a similar decision was made in *Hartley* v. *Cummings* (*b*), where there was an engagement on the part of the master to find the servant other work, in the event of the master not requiring the piece-work stipulated for, so as to enable the servant to earn a certain amount of wages per week.

Hartley v. *Cummings.*

R. v. *Welch.*

And again, in *R.* v. *Welch* (*c*), where the workman, in consideration of a small sum lent in advance of wages, "and of the wages thereinafter agreed to be paid to him" by the masters, agreed to work for and serve the said masters, as a tinplate worker, and not to work for or serve any one else without their leave in writing, for the full term of twelve months then next, and also until the expiration of three calendar months' notice by the workman given to the masters to determine the service, and to perform his work in a workmanlike manner, and not to absent himself during customary hours of work. And the masters, in consideration of the good and faithful services of the workman, agreed to pay him "on the Saturday night in every week during the aforesaid term (usual holidays excepted) all such wages as the articles made by him as aforesaid shall amount to, at their usual workmen's prices for similar articles." And the agreement also contained a proviso enabling either party to determine the agreement after twelve months by giving three calendar months' notice. It was held, in accordance with *Pilkington* v. *Scott*, that the agreement was not void for want of mutuality, and that the masters were bound to provide work; and Lord Campbell said, "The necessity of giving notice clearly shows that there is some obligation on the employer.

(*z*) Reversing the Judgment of the Court of Common Pleas, 4 C. B. 479.

(*a*) 15 M. & W. 657; see the agreement, *ante*, p. 26.

(*b*) 5 C. B. 247; see this case, *ante*, p. 26.

(*c*) 2 E. & B. 357; and see *Re Bailey* and *Re Collier*, 3 E. & B. 607, 615.

What was that? To find reasonable employment according to the state of the trade. That is not an unilateral agreement, but a mutual agreement, with something to be done on each side."

AGREEMENTS IN RESTRAINT OF TRADE CONTAINED IN *CONTRACTS* OF HIRING AND SERVICE.

Agreements in restraint of trade.

It frequently happens that professional men, manufacturers and tradesmen, on taking clerks, apprentices, servants and workmen into their employ, require them to enter into an agreement that they will not on leaving their service carry on a profession, manufacture or trade similar to their own within certain limits; and this is done with a view to secure themselves from competition with those who having been in their service have thereby had opportunities of becoming acquainted with their mode of carrying on business and secrets of trade, and of insinuating themselves into the good graces of their masters' customers.

Agreements in *general* restraint of trade illegal and void.

All agreements of this sort in *general* restraint of trade (*d*) are illegal and void, and cannot be enforced either at law or in equity. And it makes no difference whether they are under seal or not, or whether they are made with or without consideration; it being contrary to public policy that any one should bind himself *generally* not to carry on his lawful trade (*e*).

(*d*) As to how far agreements made by workmen to work for a particular master for a long period, at certain wages, and *no one else*, are illegal, as being in restraint of trade, *where there is no corresponding obligation on the part of the master to find work*, see *Pilkington* v. *Scott*, 15 M. & W. 657; *Hartley* v. *Cummings*, 5 C. B. 247; *R.* v. *Welch*, 2 E. & B. 357; see these cases *ante*, p. 56.

(*e*) Com. Dig. Trade, D. 3; *Clerk* v. *Tailors of Exeter*, 3 Lev. 241; *Ipswich Tailors' case*, 11 Rep. 53 *a*; *Mitchell* v. *Reynolds*, 10 Mod. 130; *S. C.* 1 P. Wms. 181; *S. C.* 1 Smith's L. C. 171; where all the cases are collected and commented upon: and see also 3 Byth. Conv. (3rd edit.), 458, where the cases are also collected; *Hinde* v. *Gray*, 1 M. & G. 195. Contracts of this nature could not be enforced by the Roman law; see Puff. lib. v. cap. 1, sect. 3; and see Puff. lib. v. cap. 5, sect. 7, as to monopolies. It may be well here to mention that the case in the Year Books, 2 Hen. 5, fo. 5, pl. 26, which is sometimes, though inaccurately, cited as an authority that an agreement in *general* restraint of trade is void (see Com. Dig. Trade, D. 3; 1 Smith's L. C. 182; 3 Byth. Conv. 458), is not an authority for *that* position, (though the position is incontestable,) for in the case in the Year Book the restraint *was limited* in point of space, viz. "deins le ville ou le pl' etc." The real reason why the bond in that case was bad, (if, indeed, it *was* held bad, for in *Broad* v. *Jollyfe*, Cro. Jac. 596, it is said that the bond in the case in the Year Book was "allowed good,") was that no circumstances appeared to show it to be reasonable; see *Prugnell* v. *Gosse*, Aleyn, 67; *S. C.* Cro. Eliz. 872; *Claygate* v. *Bachelor*, Owen, 143; and see also *Hutton* v. *Parker*, 7 Dowl. 739. The case in the Year Book is only an authority that a restraint of trade in a *particular place* is bad *unless circum-*

Hilton v. *Eckersley.*

Combination bonds illegal.

It was upon this principle, and not as being in violation of any statute, that the bond in *Hilton* v. *Eckersley* (*f*) was held both by the Queen's Bench (dissentiente Erle, J.) and Exchequer Chamber to be void as being in general restraint of trade. The bond was entered into by eighteen cotton-spinners, each of whom were severally bound to the plaintiff in 500*l*. The condition recited that the obligors were respectively owners of spinning-mills, and employed in them many work-people; that there were societies and combinations among divers persons, whereby persons otherwise willing to be employed were deterred by fear of social persecution and other injuries from hiring themselves to work, and whereby the legal control of the obligors of their property was injuriously interfered with; that these combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate on the persons employed by and receiving wages from the obligors, and in the opinion of the obligors it had become necessary to take measures for vindicating their legal rights to the control of their property, which would also best sustain the rights of the labourer to the free disposal of his skill and industry, and therefore the obligors had agreed to carry on their works in regard to the amount of wages to be paid to persons employed therein, and the times or periods of the engagement of work-people and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishments, in conformity with the resolution of a majority of the obligors present at any meeting to be convened as thereinafter mentioned. And the condition of the bond was that if the obligors and their partners should for twelve months carry on and conduct, or wholly or partially suspend the carrying on of their works in regard to the several matters aforesaid, in conformity with the resolutions of a majority of the obligors present at a meeting to be held as thereinafter mentioned, then the bond as to each person so performing should be void. And the days, &c. of the proposed meeting were set out; the obligee to hold the money in trust for all the obligors; with power for a majority of the obligors at a meeting to release the obligors from performance of the condition. But the bond was held void as being against public policy.

Judgment of Exchequer Chamber.

In delivering the judgment of the Exchequer Chamber, Alderson, B., said:—

"The question is, whether this is a bond in restraint of trade, and we think it is so. *Primâ facie* it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter

stances are recited or averred showing it to be reasonable; and for this purpose it is cited by Lord Wensleydale in his judgment in *Mallan* v. *May*, 11 M. & W. 665, *post*, p. 61.

(*f*) 6 E. & B. 47. The case is so important that the judgment of the Exchequer Chamber is given at length. In the Queen's Bench, Lord Campbell, C. J., expressed great regret at the course of decisions which had thrown upon the *Judges* the burden of deciding what was or was not contrary to public policy.

regulated or restrained his mode of doing this the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligors to this bond have clearly put themselves into a situation of restraint. *Hilton* v. *Eckersley.* Judgment of Exchequer Chamber.

"First: each of them is prevented from paying any amount of wages except such as the majority may fix, whatever may be the circumstances of the work to be done and his own opinion thereon. Secondly: they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it for their own interest to do otherwise. The hours of work, the suspending of work partially or altogether, the discipline of their establishments, is to be regulated by others forming a majority, and taken from every individual member. And all this for a fixed period of twelve months. All these are surely regulations restraining each man's power of carrying on his trade according to his discretion for his own best advantage, and therefore are restraints on trade not capable of being legally enforced.

"We do not mean to say that they are illegal in the sense of being criminal and punishable. The case does not require us, and we think we ought not to express any opinion on that point.

"But then it is said that these regulations, otherwise illegal, are prevented from being so considered by the circumstances against which they were intended to operate. It appears that a counter combination existed on the part of certain workmen, and that the alleged object of this bond was to counteract this, and to set the willing and industrious workman free from its powers. But supposing this to be the object, and that we may even consider it as laudable, we cannot agree that it is laudable or right to use such means of counteraction. The maxim "Injuria non excusat injuriam," is a sound one both in common sense and at common law. This is only to put one wrong as counterbalancing another wrong, to place the industrious workman in the fearful situation of being oppressed by a majority of masters, in order to prevent him from being oppressed by a majority of his fellow-workmen. And, besides, here it is to be observed that the masters' combination is not limited to the duration of the suggested combination of the workmen. It is to last for twelve months absolutely; so that if the combinations assigned as the excuse for it broke up, as they almost always do, in a short period, this restraint upon the obligors would still continue in force after the object against which it seems to have been directed had long ceased to exist.

"The bond, therefore, if not altogether illegal and punishable, is framed to enforce at all events a contract by which the obligors agree to carry on their trade, not freely, as they ought to do, but in conformity to the will of others; and this, not being for a good consideration, is contrary to the public policy.

"We see no way of avoiding the conclusion, that if a bond of this sort between masters is capable of being enforced at law, an agreement to the same effect amongst workmen must be equally legal and enforceable; and so we shall be giving a

legal effect to combinations of workmen for the purpose of raising wages, and make their strikes capable of being enforced at law. We think that the legislature have been contented to make such strikes not punishable, and certainly they never contemplated them as being the subject of enforcement by a suit at law on the part of the body of delegates against any workmen who might have been seduced by some designing person to sign an engagement, with penalty to continue in the strike as long as a majority were for holding out."

Upon this last point Lord Campbell, in Queen's Bench, said: "There must be entire reciprocity between liberty to the masters and liberty to the men; and it seems to me that a decision in favour of this bond would establish a principle upon which the fantastic and mischievous notion of a 'labour parliament' might be realized, for regulating the wages and the hours of labour in every branch of trade all over the empire. The most disastrous consequences would follow to masters and to men and to the whole community."

Wallis v. *Day*. Contract on sale of business to serve the purchaser for life not illegal.

But where a man who for many years had carried on the business of a carrier (*g*) sold and assigned the goodwill of his business to the defendants, and covenanted with them that he would not at any time from thenceforth during the term of his natural life either by or for himself, or for or with any other person whomsoever in trust for him, or to or for his benefit, set up, exercise, or in any sort or manner howsoever use or follow the trade or business of a carrier except as thereinafter was excepted, and that he would from thenceforth during his life well and faithfully serve the defendants as an assistant in the said trade or business of a carrier, &c.: and the defendants covenanted to pay him certain weekly sums: it was held that the agreement was not void as being in general restraint of trade.

Agreements in *partial* restraint of trade upheld.

"And it may often happen that individual interest and general convenience render engagements not to carry on a trade or to act in a profession in a *particular place* proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade and the promotion of industry" (*h*).

Accordingly, reasonable agreements in *partial* restraint of trade have always been held to be valid. For partial restraints, however, there must be some consideration, otherwise they are

(*g*) *Wallis* v. *Day*, 2 M. & W. 273. As to the dictum in that case, that a contract to serve another for life must be by deed, see 1 Smith's L. C. 183 *d*, note to *Mitchell* v. *Reynolds*.

(*h*) *Per* Best, C. J., in *Horner* v. *Ashford*, 3 Bing. 326.

impolitic and oppressive (*i*). Without a consideration such an agreement, if under seal, would be unreasonable (*k*); and if not under seal, would be *nudum pactum* (*l*). If, however, there appear to be *a* consideration, courts of law will not inquire into the adequacy of it (*m*).

Mallan v. *May.*

The law upon the subject of agreements in restraint of trade is admirably stated by Lord Wensleydale in *Mallan* v. *May* (*n*). In that case, by an agreement under seal it was agreed that the defendant should become assistant to the plaintiffs in their business of surgeon dentists for four years; that the plaintiffs should instruct him in the business, and that after the expiration of the term the defendant should not carry on that business in London or in any of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. The agreement, so far as related to not carrying on the business in London was held valid, but the remainder of the restriction was held unreasonable and void. And in giving judgment Lord Wensleydale said: "The rule as laid down by Lord Macclesfield (*o*) and Lord Chief Justice Willes (*p*) is, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad, but if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those circumstances and determine whether the contract be valid or not; *Mitchell* v. *Reynolds* (*q*). Contracts in restraint of trade are in themselves, if nothing show them to be reasonable, bad in the eye of the law: per Tindal, C. J., in *Horner* v. *Graves* (*r*). Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in *Prugnell* v. *Gosse* (*s*) and the case of the *Ten Tailors of Exeter* v. *Clarke* (*t*), and *Claygate* v. *Bachelor* (*u*); Year Book, 2 Hen. 5, fo. 5 (*x*). But if there are circumstances recited in the instrument (or probably if they appear by averment), it is for the court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld

(*i*) *Prugnell* v. *Gosse*, Aleyn, 67; *Claygate* v. *Bachelor*, Owen, 143; *S. C.* Cro. Eliz. 872, nom. *Colgate* v. *Bachelor*.

(*k*) See *Hutton* v. *Parker*, 7 Dowl. 739; *Mallan* v. *May*, 11 M. & W. 665.

(*l*) *Hitchcock* v. *Coker*, 6 A. & E. 438.

(*m*) *Ibid.*

(*n*) 11 M. & W. 653.

(*o*) *Mitchell* v. *Reynolds*, 1 P. Wms. 180.

(*p*) Willes, 388, *Gunmakers' Company* v. *Fell*.

(*q*) 1 P. Wms. 196.

(*r*) 7 Bing. 744.

(*s*) Aleyn, 67.

(*t*) 2 Show. 350.

(*u*) Owen, 143; see *S. C.* Cro. Eliz. 872, nom. *Colgate* v. *Bachelor*.

(*x*) See note, *ante*, p. 57, as to this case in the Year Book.

not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a goodwill, and offers an encouragement to trade by allowing a party to dispose of the fruits of his industry; *Prugnell* v. *Gosse* (*y*); *Broad* v. *Joliffe* (*z*); *Jelliott* v. *Broad* (*a*). And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits; *Chesman* v. *Nainby* (*b*). In such a case the public derives an advantage in the unrestricted choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

Chesman v. *Nainby.*

Upon these principles, agreements in partial restraint of trade have in a variety of instances been upheld and enforced. Thus in *Chesman* v. *Nainby* (*b*), where the defendant, who was a linendraper, on taking the plaintiff's wife, before marriage, into her service, made her enter into a bond not to carry on the business of a linendraper within half a mile of the defendant's house, the bond was held good.

Colmer v. *Clark.*

And so where (*c*) the defendant in consideration that the plaintiff, who was a tallyman, would take him into his family, and instruct him in the trade, with a provision of meat, &c., and an allowance of 20*l.* wages a year, promised to serve the plaintiff for five years, and not to exercise the trade himself for seven years after that time, within the city and liberty of Westminster, and bills of mortality, the agreement was held good.

Davis v. *Mason.*

And again, where (*d*) the defendant, in consideration of the plaintiff's taking him into his service, as assistant in the business of a surgeon, &c., agreed with the plaintiff not to exercise that business on his own account within the distance of ten miles from Thetford, where the plaintiff resided, for fourteen years, the agreement was held good.

Sainter v. *Ferguson.*

And in another case (*e*), an agreement by the defendant, in consideration that the plaintiff would engage him as assistant to the plaintiff as a surgeon and apothecary, that the defendant

(*y*) Aleyn, 67.

(*z*) Cro. Jac. 596.

(*a*) Noy, 98.

(*b*) 2 Lord Raym. 1456; *S. C.* 2 Str. 739.

(*c*) *Colmer* v. *Clark*, 7 Mod. 230; *S. C.* Cas. temp. Hardwicke, 53.

(*d*) *Davis* v. *Mason*, 5 T. R. 118; and see *Hayward* v. *Young*, 2 Ch. Rep. 407, where a bond by an apothecary not to set up business within twenty miles was upheld.

(*e*) *Sainter* v. *Ferguson*, 7 C. B. 716.

would not at any time practise in his own name, or in the name or names of any other person or persons, as a surgeon or apothecary at M., or within seven miles thereof, was also held good.

How distance to be measured. *Leigh* v. *Hind.*

When an agreement not to carry on a trade within a certain distance of a particular place has been established, the distance should be measured by the nearest mode of access, and "that is to be considered the nearest way of access which a person making the best of his way from house to house would be likely to take: that is, using the footway where there was one, and where it was most convenient to use it, and the carriage way, either where it could be most conveniently used, or where there was no footpath" (*f*). And "the nearest mode must be taken according to the existing state of the streets. If subsequently to the covenant, the covenantor took a public-house, the distance of which, by the then shortest way of access, would be greater than that agreed upon from the one he sold, and a new street were afterwards opened, whereby the distance, by the shortest way of access, became less than that mentioned in the covenant, the covenantor would thereupon incur a breach of covenant" (*g*).

As the crow flies.

In construing covenants of this sort, however, much must depend on the precise language used. When the legislature has used the expression "within twenty miles," the courts have laid down an arbitrary rule that the distance is to be measured in a straight line on a horizontal plane, or in popular language, "as the crow flies" (*h*). This rule has been applied by Wood, V. C., in granting an injunction to restrain the breach of a covenant in restraint of trade (*i*), and, added the Vice-Chancellor, "if the parties mean the distance to be measured by roads and streets, they should say so."

Whether reasonable or not is a question for the court.

But although agreements in partial restraint of trade are in many cases upheld, yet, in order to be valid, they must be *reasonable*, even though under seal (*k*). The question, whether or not any particular agreement of this sort is reasonable, is one for the determination of the court (*l*). No certain precise

(*f*) *Per* Parke, J., in *Leigh* v. *Hind*, 9 B. & C. 775; see *Atkyns* v. *Kinnier*, 4 Exc. 776; *S. C.* 19 L. J., Exc. 132.

(*g*) *Per* Littledale, J., in *Leigh* v. *Hind*, *ubi supra*.

(*h*) *R.* v. *Saffron Walden*, 9 Q. B. 76; *Stokes* v. *Grissell*, 14 C. B. 678; *Lake* v. *Butler*, 5 E. & B. 92; *Jewel* v. *Stead*, 6 E. & B. 350.

(*i*) *Duignan* v. *Walker*, 1 Johns. 446; *S. C.* 33 L. T. 256.

(*k*) See *Hutton* v. *Parker*, 7 Dowl. 739, and cas. cit. *infra*.

(*l*) *Homer* v. *Ashford*, 3 Bing. 322; *Mallan* v. *May*, 11 M. & W. 653; *Tallis* v. *Tallis*, 1 E. & B. 391. In the latter case, p. 404, Erle, J., said, "It always seemed to me a difficulty, that if the court is to decide what restraint is reasonable they must judicially determine a question, the solution of which may require knowledge both of the statistics of the trade and of the geographical situation of places;" and Lord Campbell, C. J., added, "If it were *res integra*, I do not see the objection to casting on the defendant the burthen of pleading and proving, as a fact, that the restraint was more than was reasonable."

There is no precise rule on the subject.

A test.

boundary can be laid down within which the restraint would be reasonable, and beyond which, excessive. But "a better test cannot be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable" (*l*).

Horner v. *Graves.* Where restraint held unreasonable.

Applying this test to an agreement (*m*), whereby the defendant covenanted with the plaintiff, that he the defendant would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon dentist for five years: and the plaintiff, in consideration of such service, and of the covenants of the defendant, did covenant with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon dentist: and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention; "and that the defendant should not, nor would at the expiration or other sooner determination of the said term (provided the said plaintiff were then living and practising in the said business or profession), exercise and practise the said business or profession at or within the distance of 100 miles of the city of York, without the previous consent in writing of the said plaintiff, under the penalty of 1,000*l*." The restriction was held unreasonable, and judgment arrested.

Mallan v. *May.*

Upon the same principle, part of the agreement in *Mallan* v. *May* (*n*), (that part, namely, which restrained the defendant from practising as a surgeon dentist in any of the towns or places in England or Scotland, where the plaintiffs, or the defendant on their account, might have been practising before the expiration of the defendant's service,) was held to be unreasonable and void.

Price v. *Green.*

And in *Price* v. *Green* (*o*), a covenant not to carry on the trade of a perfumer, toyman, and hair merchant, within the cities of London and Westminster, *and the distance of* 600 *miles from the same respectively*, was held to be void as to the 600 miles, though good as to London and Westminster.

But agreements not to carry on the business of an attorney

(*l*) *Per* Tindal, C. J., in *Horner* v. *Graves*, 7 Bing. 743; and see *Hitchcock* v. *Coker*, 6 A. & E. 454; *Mallan* v. *May*, *ubi supra*; *Ward* v. *Byrne*, 5 M. & W. 548, 561; *Procter* v. *Sargent*, 2 M. & G. 32; *Dendy* v. *Henderson*, 11 Exc. 198. As to how far an agreement to serve a particular master and no one else for seven years is void as being an unreasonable restraint of trade, where the master is not bound to employ the servant, see *Hartley* v. *Cummings*, 5 C. B. 247; *ante*, p. 26.

(*m*) *Horner* v. *Graves*, *ubi supra*; and see *Young* v. *Timmins*, 1 Cr. & J. 331.

(*n*) 11 M. & W. 653; *ante*, p. 61.

(*o*) 16 M. & W. 346; and see *Nicholls* v. *Stretton*, 10 Q. B. 346.

in London, or the distance of 150 miles round (*p*), or in Great Britain, for the space of twenty years (*q*), have been held not unreasonable. And "five miles from Northampton Square, in the county of Middlesex," in the case of a milkman (*r*), and "London," in the case of a surgeon dentist, were considered not unreasonable distances (*s*).

Cases in which restraint held to be reasonable.

And upon a dissolution of partnership between persons in the canvassing trade, a covenant by the defendant not to be concerned in that trade in "London, or within 150 miles of the General Post Office, nor in Dublin or Edinburgh, or within fifty miles of either, nor in any town in Great Britain or Ireland, in which the plaintiff, or his successors, might at the time have an establishment, or might have had one within the six months preceding," was held not unreasonable (*t*).

Tallis v. *Tallis.*

And in the following case also the agreement was upheld as reasonable (*u*):—

Dendy v. *Henderson.*

By agreement reciting that the plaintiff, being solicitor for, and general manager of, certain estates at Torquay, in the parishes of Tormoham and St. M., and having occasion for the services of a managing clerk, to reside at Torquay, finding it expedient to establish an office there for the transaction of law and other business, had proposed to appoint the defendant as resident clerk there, upon his entering into the agreement thereinafter contained: it was agreed that defendant should continually reside, except as otherwise directed by plaintiff, at Torquay, and to have the use of three rooms in the house where such office should be kept; that defendant should have the salary therein mentioned, and should exclusively devote his time and attention to the interest of the plaintiff, and should not make use of his own name in any business matter or as agent, except as agent for plaintiff, his executors, &c., and should not take any other situation, or transact any other business on his own account, or for his own profit, or on account or for the profit of any other person than plaintiff, his executors, &c., without his consent; that either party should be at liberty to determine the agreement by notice, as therein mentioned; but in case of any such determination by either party, the defendant should not, unless with and during the consent of the plaintiff, (such consent to be revocable at any time,) for the space of twenty-one years from the expiration of such notice, and notwithstanding the decease of the plaintiff previous to or during the period aforesaid, reside in the parish of Tormoham or of St. M., or within twenty-one miles thereof, or transact or carry on therein or within the distance aforesaid, either for himself or any other person, or in partnership or connexion with any other

Agreement between solicitor and resident clerk.

(*p*) *Bunn* v. *Guy*, 4 East, 190; and see *Gulsworthy* v. *Strutt*, 1 Exch. 67.

(*q*) *Whitaker* v. *Howe*, 3 Beav. 383; but see as to this case, *post*, p. 67.

(*r*) *Procter* v. *Sargent*, 2 M. & G. 20; see *Benwell* v. *Inns*, 26 L. J., Ch. 663.

(*s*) *Mallan* v. *May*, 11 M. & W. 653; *ante*, p. 61. In that case "London" was held to mean the *City* of London.

(*t*) *Tallis* v. *Tallis*, 1 E. & B. 391.

(*u*) *Dendy* v. *Henderson*, 11 Exch. 194.

person, during the period of twenty-one years, any business of the nature or description of the business that might be carried on under the agreement, or might be intended so to be, under a penalty of 2,000*l.*, to be recovered as liquidated damages. That the agreement should not determine on the decease of the plaintiff, unless notice should have been previously given by either party. And a plea by the defendant that although he had resided in Tormoham, he had not done so for the purpose of carrying on business of the nature referred to in the agreement, was held bad on demurrer.

Agreements not under seal in restraint of trade must show consideration.

In the case of an agreement in partial restraint of trade, *not under seal*, it is necessary, not only that it should be reasonable, but also that there should appear to be *a consideration* to support it, otherwise it would be merely *nudum pactum* and void. An opinion at one time prevailed (*u*), or, more accurately speaking, was supposed to prevail, that the courts would inquire into the adequacy of the consideration. But that opinion is now entirely exploded (*x*).

Courts will not inquire into *adequacy* of consideration.

Duration of restraint (in other respects valid) unimportant.

If an agreement in partial restraint of trade be in other respects valid, it is no objection that the restraint be imposed for the whole life of the party subject to it.

Hitchcock v. *Coker.*

Thus, where (*y*) it appeared that the plaintiff, who was a druggist, had taken the defendant into his service as an assistant, at a certain annual salary, and in consideration thereof the defendant agreed that, if he "should *at any time thereafter*, directly or indirectly, in his own name, or in the name of any other person, use, exercise, carry on or follow the trades or businesses of a chemist and druggist, or either of them, within the town of Taunton, in the county of Somerset, or within three miles thereof," then he would pay to the plaintiff 500*l.* for liquidated damages, it was held that the agreement was not void merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

Hastings v. *Whitley.*

And so, where (*z*) the defendant, on becoming assistant to the plaintiff, who was a surgeon, entered into a bond not to practise as a surgeon at, or within ten miles of, S., *at any time*, without the consent, in writing, of the obligee, it was held that the restraint was not confined to the lifetime of the obligee, but was co-extensive with that of the obligor, and that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

Elves v. *Croft.*

So a covenant not to carry on the trade of a butcher within five miles was held good, although indefinite in point of duration (*a*).

(*u*) See *per* Alderson, B., in *Pilkington* v. *Scott*, 15 M. & W. 660.

(*x*) *Hitchcock* v. *Coker*, 6 A. & E. 456; and see also *Archer* v. *Marsh*, 6 A. & E. 959; *Leighton* v. *Wales*, 3 M. & W. 551; *Pilkington* v. *Scott, ubi supra; Sainter* v. *Ferguson*, 7 C. B. 716; and see *per* Lord Wensleydale, in *Moss* v. *Hall*, 5 Exc. 49, 50; *Tallis* v. *Tallis*, 1 E. & B. 391.

(*y*) *Hitchcock* v. *Coker*, 6 A. & E. 438.

(*z*) *Hastings* v. *Whitley*, 2 Exc. 611; and see a similar agreement upheld in *Sainter* v. *Ferguson*, 7 C. B. 716.

(*a*) *Elves* v. *Croft*, 19 L. J., C. B. 385; *S. C.* 10 C. B. 241.

And as, on the one hand, the indefinite duration of a restriction will not invalidate the contract whereby that restriction is imposed, if in other respects reasonable, so, on the other hand, the definite limitation of a restriction in point of time will not render valid a restraint in other respects unreasonable.

But definite limitation in point of time will not alone support restraint in other respects unreasonable.

Thus, where (*b*) the defendant, upon entering the service of the plaintiff, who was a coal merchant, as town traveller and collecting clerk, gave him a bond conditioned (*inter alia*) that he should not, within two years after leaving the plaintiff's service, solicit or sell to any customers of the plaintiff, that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the plaintiff's employ, and that he should not leave his employment without giving a month's notice, it was held that the bond was void as being in general restraint of trade, and that the restriction being limited in point of time did not render it valid.

Ward v. *Byrne.*

A case (*c*), however, has been decided in Equity somewhat at variance with *Ward* v. *Byrne*, in which Lord Langdale, M. R., enforced, by injunction, an agreement entered into by an attorney not to practise in Great Britain for the space of twenty years without the consent of the person to whom he had sold his business. Of this case, Patteson, J., is reported to have said (*d*), "I cannot help thinking that the Master of the Rolls there must have proceeded on the ground that the limitation was for twenty years only." And on *Ward* v. *Byrne* being cited, the same learned Judge observed, "I do not see how that case can be reconciled with *Whitaker* v. *Howe*." It must be observed, however, that in *Whitaker* v. *Howe* the restriction was limited as to space, viz., to Great Britain; but in *Ward* v. *Byrne* the restriction was not limited at all as to space, though it was as to time. The decision in *Whitaker* v. *Howe*, therefore, *may* only amount to this, that the whole of Great Britain is not an unreasonable restriction on the sale of the goodwill of an attorney's business. If it be considered as a decision that a general restraint on trade, unlimited except in point of duration, is good, it is conceived that it cannot be supported, being at variance with all the earlier authorities.

But see *Whitaker* v. *Howe.*

Nicholls v. *Stretton.*

Together with the cases in which contracts in partial restraint of trade have been upheld may be classed those in which a servant or clerk enters into a contract not to interfere with, or solicit, the business of those persons who are his employer's customers. Such agreements are in general valid, whether the customers are named in a schedule or not (*e*).

Contract not to solicit certain customers valid.

Thus, where (*f*) an articled clerk to an attorney, in con-

Nicholls v. *Stretton.*

(*b*) *Ward* v. *Byrne*, 5 M. & W. 548; and see *Hinde* v. *Gray*, 1 M. & G. 195; *Procter* v. *Sargent*, 2 M. & G. 20.

(*c*) *Whitaker* v. *Howe*, 3 Beav. 383; see *Bryson* v. *Whitehead*, 1 Sim. & St. 74, where an agreement not to carry on the business of a dyer for twenty years was considered too large.

(*d*) In *Nicholls* v. *Stretton*, 10 Q. B. 353; and see *S. C.* 7 Beav. 42.

(*e*) *Hunlocke* v. *Blacklowe*, 1 Wms. Saund. 156; *Rannie* v. *Irvine*, 7 M. & G. 969; *Nicholls* v. *Stretton*, 10 Q. B. 346.

(*f*) *Nicholls* v. *Stretton*, *ubi supra.*

sideration of the attorney taking him as an articled clerk, without any premium, covenanted that he would not during the articles, or at any time after their expiration, interfere with, or act as attorney or agent for, any person who had already been, or who should from time to time thereafter become or be the client, or correspondent in business, of the attorney, or any partner of his, or any person to whom he might sell his business, it was held that the attorney might recover in respect of breaches of covenant with regard to persons who had been his clients before and at the time of making the deed, and of persons who had been his clients whilst the clerk continued under articles.

Contract not to use particular secret of trade.

Upon similar principles a person may, by agreement, restrain himself *generally* from the use of a particular secret in his trade (*g*).

Agreement partly good and partly bad upheld as to good part.

If an agreement in restraint of trade is partly good and partly bad, and the good part can be separated from the bad without injury to the sense, the good part will be upheld, and the bad part rejected (*h*).

Not binding on executors.

But an agreement in restraint of trade is not binding on the executors of the party restrained, so as to prevent *their* carrying on the prohibited trade (*i*).

Mode of securing performance of contract in restraint of trade.

The performance of a contract in restraint of trade is usually secured by a bond or covenant, not to do that which it is intended to prohibit, and in the event of a breach of that stipulation, to pay a certain sum as liquidated damages (*k*).

By penalty.

In contracts of this sort, where the damages are capable of accurate measurement, the terms "liquidated damages," are to be construed as a penalty. But if there be a contract, the breach of which cannot be measured, then the courts have held that the parties mean what they say, for this reason, that the subject-matter of the covenant is incapable of valuation (*l*). Upon this principle, as it is almost impossible to calculate the precise amount of damage which one person has sustained by the competition of another, who has been carrying on his trade in the neighbourhood after having contracted not to do so, the courts have almost, if not quite, invariably held in such cases, that the parties meant what they said, and the plaintiffs have recovered the whole amount of the stipulated penalty.

(*g*) *Bryson* v. *Whitehead*, 1 Sim. & St. 74.

(*h*) *Chesman* v. *Nainby*, 2 Str. 739; *S. C.* 2 Lord Raym. 1456; *Mallan* v. *May*, 11 M. & W. 653; *Price* v. *Green*, 16 M. & W. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346; *Tallis* v. *Tallis*, 1 E. & B. 391, 412; and see *Bryson* v. *Whitehead*, 1 Sim. & St. 74.

(*i*) *Cooke* v. *Colcraft*, 2 W. Bl. 856; *S. C.* 3 Wils. 380. *Semble*, however, that the restraint in that case was void, being in *general* restraint of trade.

(*k*) *Shackle* v. *Baker*, 14 Ves. 468.

(*l*) *Per* Lord Wensleydale in *Atkyns* v. *Kinnier*, 19 L. J., Exc. 132; *S. C.* 4 Exc. 776; and see *Kemble* v. *Farren*, 6 Bing. 141; *Horner* v. *Flintoff*, 9 M. & W. 678; *Price* v. *Green*, 13 M. & W. 701; *Galsworthy* v. *Strutt*, 1 Exc. 659; *Reynolds* v. *Bridge*, 26 L. J., Q. B. 12; *S. C.* 6 E. & B. 528; *Mercer* v. *Irving*, 27 L. J., Q. B. 291; *Betts* v. *Burch*, 28 L. J., Exc. 267.

But where (*m*), by an agreement between plaintiff and defendant, the defendant agreed to become assistant to the plaintiff, in his profession of photographic painter, for the term of five years, and to give up his whole time to retouching portraits, &c., and not to take employment from others, and to follow the plaintiff's directions, and not divulge his secrets of the art, and be faithful to the plaintiff in his dealings, and the plaintiff agreed to pay the defendant a weekly remuneration for every portrait retouched after certain rates, and to guarantee that the defendant should be continually supplied with portraits to retouch; and, lastly, it was agreed that they should respectively forfeit 500*l.* as liquidated damages, in case of any breach, by either of them, in the true performance of the terms of the agreement; it was held that there was no doubt, nor, indeed, was it disputed, that the intention of the parties was *not* that the sum of 500*l.* should be paid absolutely by way of liquidated damages, on non-performance of any of the stipulations contained in the agreement. It was merely a penalty. *Reindel* v. *Schell.*

And where a person has entered into a valid binding contract, not to carry on his business in a particular place or manner, to the injury of another, courts of equity will restrain him from doing so by injunction (*n*). But they will not interfere by injunction where it is doubtful whether or not the act complained of amounts to a breach of the contract, but will leave the parties to their action at law (*o*). The remedy by injunction is often a more complete and effectual remedy than an action for the penalty agreed upon. And it seems that the jurisdiction of courts of equity, to restrain by injunction an act which a defendant is by contract or duty bound to abstain from, is not confined to cases in which those courts have jurisdiction over the acts of a *plaintiff;* the want of mutuality in the contract affords no objection to the exercise of the jurisdiction (*p*). By injunction.

And it is no objection to the exercise of this equitable jurisdiction, that the court cannot enforce the affirmative part of the contract. If there is a negative part which they can prohibit a breach of, they will do so.

Thus, where a singer agreed that she would sing for a certain number of nights at the plaintiff's theatre, and *not elsewhere* without his written authority, the Lord Chancellor granted an injunction to restrain her from singing elsewhere, although *Lumley* v. *Wagner.*

(*m*) *Reindel* v. *Schell*, 27 L. J., C. P. 146.

(*n*) *Whitaker* v. *Howe*, 3 Beav. 383; *Nicholls* v. *Stretton*, 7 Beav. 42; see *French* v. *Macale*, 2 Dr. & W. 275, where Lord St. Leonards states the general rule of equity to be, that "if a man covenant to abstain from doing a certain act and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act, and he cannot elect to break his engagement by paying for his violation of the contract." See also *Gerard* v. *O'Reilly*, 3 Dr. & W. 414.

(*o*) *Turner* v. *Evans*, 2 De G. M. & G. 740; 2 E. & B. 512.

(*p*) *Dietrichsen* v. *Cabburn*, 2 Phill. 52; *Morris* v. *Coleman*, 18 Ves. 437; *Stocker* v. *Wedderburn*, 3 Kay & J. 393; but see *Hilis* v. *Croll*, 2 Phill. 62; 1 De G. M. & G. 326.

he could not enforce the specific performance of the entire contract (*q*).

Granted in favour of purchaser of master's business.

Benwell v. *Inns.*

Where a milkman, on being taken into the service of a cowkeeper, &c., agreed faithfully to serve, &c., the master and his *assignees* or successors in business, and that he would not during such service, nor within the space of twenty-four calendar months after quitting or being discharged from the same, commence, carry on, or be concerned in any way whatsoever, either as servant or master in the trade or business of a cowkeeper, milkman, milkseller or milk carrier, within the distance of three miles from C. street, it was held, that the plaintiff having purchased the business from the master, was entitled to an injunction to prevent the servant setting up an opposition business (*r*).

Refused after recovery of penalty.

But the courts of equity will not grant an injunction where a party, who is entitled to the benefit of an agreement not to carry on a trade under a stipulated penalty as *liquidated damages*, has, in an action at law for breach of the agreement, recovered judgment for the full amount of stipulated penalty. As in that case the court will consider that he has purchased the right to do the act, and to restrain his doing it would be telling him that he should not have the full benefit of his purchase (*s*).

(*q*) *Lumley* v. *Wagner*, 1 De G., M. & G. 604, overruling *Kemble* v. *Kean*, 6 Sim. 335; where Shadwell, V. C., had refused an injunction under similar circumstances. See also *De Mattos* v. *Gibson*, 28 L. J., Ch. 498.

(*r*) *Benwell* v. *Inns*, 26 L. J., Ch. 663.

(*s*) *Sainter* v. *Ferguson*, 1 M. & G. 286; but see *Hardy* v. *Martin*, 1 Cox, 26; *Tall* v. *Ryland*, 1 Ch. Cas. 183; *Barret* v. *Blagrave*, 5 Ves. 555; *French* v. *Macale*, 2 Dr. & W. 269; *supra*, p. 69, note (*n*).

CHAPTER III.

THE DUTIES OF THE SERVANT TO THE MASTER, AND THE RIGHTS AND REMEDIES OF THE MASTER TO ENFORCE THE PERFORMANCE OF THEM.

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1. AS BETWEEN MASTER AND SERVANT.

It is not proposed in the present work to enter upon a discussion of the *moral* duties of a servant towards his master. Neither is it proposed, *in this chapter*, to consider the cases in which the *criminal* law prescribes punishment for misconduct on the part of a servant. That part of the subject will be treated of hereafter (*a*). This chapter will be confined to a consideration of the duties which are *civilly* binding upon a servant, and the civil remedies open to a master who has sustained injury by the breach of such duties.

DUTIES OF SERVANT TO MASTER, AND ACTION BY MASTER AGAINST SERVANT FOR BREACH THEREOF.

Action by master against servant; for not entering his service: *Richards* v. *Hayward*.

In the first place, it is clearly the duty of a person who has engaged to enter into the service of another, in any capacity, to fulfil his engagement by entering into such service: and if he fail to do so, without any good reason, he will be liable to an action for such breach of contract (*b*). As where a man agreed to go out to Australia in the plaintiff's ship, as surgeon, but afterwards refused to go; the plaintiff recovered damages in an action against him (*c*). Since, however, a master would rarely

(*a*) *Post*, Chaps. VIII. and IX.
(*b*) *Cotes* v. *Sadler*, 2 Keb. 16.
(*c*) *Richards* v. *Hayward*, 2 M. & G. 574.

deem it worth his while to bring an action against a servant who had engaged to enter into his service for refusing to do so, except, perhaps, in the case of actors and singers (*d*), and superior skilled workmen: it will be sufficient, upon that subject, to observe that, to enable a master to sustain such an action, it would, of course, be necessary for him to prove a *legally binding* contract of hiring and service (*e*).

For leaving it too soon.

So, also, it is equally clearly the duty of every person who has *entered into* the service of another to continue in such service during the whole time that he has contracted for, and if he depart without any good reason he will be liable to an action for so doing. Where, therefore, B. covenanted to serve A. as a journeyman for five years, and to work at the usual hours daily under a penalty of 100*l.*, but before the expiration of the five years departed out of the service, A. recovered against him in an action of debt the full sum of 100*l.* and costs (*f*). In this case, also, it would be equally necessary to prove a legally binding contract of hiring and service.

Bird v. *Randall.*

Not enforceable in equity.

It is conceived, however, that a court of equity would neither grant a decree for specific performance of a contract of hiring and service, nor attempt to enforce the performance of such a contract by granting an injunction for that purpose (*g*).

Duties of servant during service, generally.

The duties of a servant to his master, *during his service*, must, generally speaking, depend, in a great measure, upon the nature of his employment, his master's business, and the contract he has entered into with his master. There are, however, many duties which are implied by law from the relationship of master and servant, and are binding upon all servants. Thus, every servant is bound to obey all the lawful orders of his master (*h*), and to be honest (*i*), and diligent (*k*), in his master's business. "Further, as in this contract, the condition of the master is more advantageous than that of the servant, the servant ought to respect his master according to his station in the world" (*l*).

Servant is liable for gross negligence;

Every servant, moreover, is bound to take due and proper care of his master's property intrusted to him; and if guilty of *gross negligence*, whereby his master's property is injured, he will be liable to an action (*m*); but he is not obliged to preserve

(*d*) *Astley* v. *Weldon*, 2 B. & P. 346; *Kemble* v. *Farren*, 6 Bing. 141; *Lumley* v. *Wagner*, 1 De G., M. & G. 604.

(*e*) See the preceding Chapter as to the requisites of the Contract.

(*f*) *Bird* v. *Randall*, 3 Burr. 1345; and see *Huttman* v. *Boulnois*, 2 C. & P. 513; *Lees* v. *Whitcomb*, 5 Bing. 34; *Messiter* v. *Rose*, 13 C. B. 162; *S. C.* 22 L. J., C. P. 78.

(*g*) See *Stocker* v. *Brocklebank*, 20 L. J., Ch. 408; *Lumley* v. *Wagner*, 1 De G., M. & G. 604; *Johnson* v. *Shrewsbury and Birmingham Railway Company*, 17 Jurist, 1015; *Webster* v. *Dillon*, V. C. Wood, Apr. 18, 1857; *Gye* v. *Graziani*, V. C. Wood, E. T. 1859.

(*h*) *Post*, p. 77.

(*i*) *Post*, p. 79, and *post*, Chap. VIII.

(*k*) *Post*, p. 79.

(*l*) Puff. de Off. Hom. ac Civ. lib. 2, cap. 4, s. 2; and see *per* Lord Kenyon in *Limland* v. *Stephens*, 3 Esp. 269.

(*m*) *Countess of Salop* v. *Crompton*, Cro. Eliz. 777, 784.

his master's property at all adventures (*n*). In all old cases (*o*), therefore, where a carrier brought an action against his servant for losing goods, it was held that the action would not lie; Holt, C. J., saying, that "There ought to be a negligence shown in the servant to make him liable to this action, for this amounts only to a bailment of goods, where, if thieves break in and steal them, he shall not answer it." And a servant entrusted with money would not be liable to his master if robbed of it (*p*).

but not accidents. *Savage* v. *Walthew.* Or robbery.

But if guilty of fraud or misfeasance, he would be liable to an action at the suit of his master. Thus, where (*q*) the plaintiff covenanted with J. S. not to import certain goods, and the defendant, being the plaintiff's servant, and knowing thereof, imported the said goods, whereby the plaintiff broke his covenant, and was sued by J. S., who recovered damages against him; it was held that the servant was bound to indemnify his master, although it was not alleged that the servant imported the goods *with intent* to damnify his master. And where (*r*) a merchant, on going abroad, trusted his servant to receive in his absence all goods that should arrive for him, and to pay the duties upon them, but the servant landed some without paying the duties, whereby they became forfeited to, and were seized on behalf of, the Queen: it was held that the merchant might maintain an action on the case against the servant for this malfeasance. And so it is said, that if a servant that drives his master's cart, by his negligence suffers the cattle to perish, an action upon the case lies against him (*s*). And if a man deliver a horse to his servant to go to market, or a bag of money to carry to London, which he neglects to do, the master may have an action of account or detainer against him (*t*). And a servant who induces an apprentice to leave his master's service is liable to an action for so doing (*u*).

Servant also liable for fraud and misfeasance. *Hussy* v. *Pacy.* *Lewson* v. *Kirk.* Servant inducing apprentice to leave his master.

A master, however, cannot maintain an action against a servant for soliciting business from his (master's) customers for himself, when his service is at an end, and he sets up on his own account (*x*). But it would seem that if a servant should endeavour to induce his master's customers to leave him, and transfer their business to the servant, whilst the relationship of master and servant subsisted, such conduct would render the servant liable to an action at the suit of the master (*y*).

Soliciting his master's customers.

A servant is also liable to an action at the suit of his master, where a third person has brought an action, and recovered damages against the master, for injuries sustained in conse-

Liability of servant to indemnify master from

(*n*) Bac. Abr. "Master and Servant," (M. 1); and see 1 Smith's L. C. 98, 99; *Nickson* v. *Brohan*, 10 Mod. 109.

(*o*) *Savage* v. *Walthew*, 11 Mod. 135.

(*p*) *Walker* v. *Guarantee Association*, 18 Q. B. 277.

(*q*) *Hussy* v. *Pacy*, 1 Lev. 188.

(*r*) *Lewson* v. *Kirk*, Cro. Jac. 265.

(*s*) 7 Hen. 4, 14; Bac. Abr. "Master and Servant," (M.)

(*t*) 21 Hen. 4, 14; Bac. Abr. "Master and Servant," (M.)

(*u*) *Turner* v. *Robinson*, 5 B. & Ad. 789; and see Grot. lib. 3, cap. 7, sect. vi. 5.

(*x*) *Nichols* v. *Martin*, 2 Esp. 732.

(*y*) *Ibid.*

consequences of his negligence.

quence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against *him*, is evidence as to the *quantum* of damages, though not as to the fact of the injury (*z*). Upon this ground, formerly (*a*), the servant through whose negligence or misconduct an injury was caused was inadmissible as a witness for his master, in an action brought against *him* for such injury, without a release (*b*).

Colburn v. *Patmore.*

But in one case a very strong opinion was expressed (though it became unnecessary to *decide* the question), that the proprietor of a newspaper, who has been convicted upon a criminal information, and fined, for the publication of a libel in the paper inserted, without his knowledge or consent, by the editor, cannot recover, in an action against the editor, the damages he has sustained by such conviction (*c*).

To account to his master.

Where a servant or other agent has received money or goods from or on account of his master or principal, he is, generally speaking, accountable to him and him only for them, as he is considered to be estopped from setting up the title of any other person, or asserting the *jus tertii*, as it is sometimes expressed, in opposition to the title of his master or principal (*d*).

Servant cannot set up *jus tertii.*

Tassell v. *Cooper.*

Upon this principle where a farm bailiff, having (wrongfully, after he was discharged) received payment for some corn of his master's, paid the money into his own private account at his bankers, it was held that it was not competent to the bankers to set up the master's right to the money, as they were accountable to their customer (*e*).

And so in equity, an agent to receive for the use of his principal cannot, by mere notice, be converted into a trustee for a third person (*f*); and an agent employed by a trustee is accountable to him only, and not to the *cestui que trust* (*g*).

(*z*) *Green* v. *The New River Company*, 4 T. R. 589; *Pritchard* v. *Hitchcock*, 6 M. & G. 165.

(*a*) See now 3 & 4 Will. 4, c. 42, and *Yeomans* v. *Legh*, 2 M. & W. 419.

(*b*) *Green* v. *The New River Company, ubi supra; Whitamore* v. *Waterhouse*, 4 C. & P. 383; and cases collected, 1 Phill. on Evid. 101; 2 Smith's L. C. 52, note to *Bent* v. *Baker.*

(*c*) *Colburn* v. *Patmore*, 1 Cr. M. & R. 73; see the note at the end of the case. And see also *Campbell* v. *Campbell*, 7 Cl. & Fin. 181; 1 Smith's L. C. note to *Lampleigh* v. *Brathwait; Shackell* v. *Rozier*, 2 Bing. N. C. 634. The question, however, could hardly arise, since the statute 6 & 7 Vict. c. 96, s. 7; *vide post*, Chap. V.

(*d*) *Dixon* v. *Hamond*, 2 B. & Ald. 310; *Roberts* v. *Ogilby*, 9 Price, 269; *Gosling* v. *Birnie*, 7 Bing. 339; *White* v. *Bartlett*, 9 Bing. 378; *Holl* v. *Griffin*, 10 Bing. 246; *Sims* v. *Britain*, 4 B. & Ad. 375; *Kieran* v. *Sandars*, 6 A. & E. 515; *Ireland* v. *Thompson*, 4 C. B. 171; see Story on Ag. 217; Smith's Merc. Law, 107. A common carrier, who is bound to receive goods, may set up *jus tertii* against the person from whom he received them; *Sheridan* v. *New Quay Company*, 28 L. J., C. P. 58.

(*e*) *Tassell* v. *Cooper*, 9 C. B. 509.

(*f*) *Nicholson* v. *Knowles*, 5 Madd. 47; see *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1; *Stuart* v. *Welch*, 4 Myl. & Cr. 323; *Fyler* v. *Fyler*, 3 Beav. 558.

(*g*) *Myler* v. *Fitzpatrick*, 6 Madd. 360.

Upon similar principles a sub-agent is accountable to the superior agent, by whom he was employed, and not to the principal (*h*). The above-mentioned estoppel, however, does not operate where the title of the master or principal accrued fraudulently or tortiously (*i*), or under a defeasible contract, which has actually been defeated (*k*). And in such cases the servant or agent has been allowed to set up the *jus tertii* in opposition to the claim of his master or principal (*l*). The question as to how far a servant may rely upon his accountability to his master, and the maxim *Respondeat superior*, in opposition to the claims of third parties, will be treated of in a subsequent Chapter (*m*). The cases, however, in which *that* question arose, must be carefully distinguished from those in which the action is brought by the master; as a third person, who has a good title to goods, may, in general, recover them from the servant, notwithstanding the bailment (*n*).

Except in certain cases.

Where a servant is in the habit of receiving money for the use of his master, and, by the established course of dealing, pays it over to his master from time to time, without any written vouchers passing between them, then the presumption of law is, that all sums so received by the servant are regularly paid over to the master. Therefore, where there has been such a course of dealing, in an action by the master against the servant for money had and received, it is not enough for the master to prove that sums have been received by the servant to his use; but the *onus* lies upon *him* to prove by positive evidence that the servant has not duly accounted with him (*o*).

Presumption of payment by servant to master from course of dealing.

And a servant or agent receiving money from his master or principal to pay to a third person, and paying it accordingly, is not liable to repay his master or principal, although the circumstances be such that the third person clearly cannot retain the money. The action should be brought against such third person directly, in the name of the master, or, under certain circumstances, in the name of the servant or agent (*p*).

Servant not liable to refund money paid according to orders.

(*h*) *Cartwright* v. *Hately*, 1 Ves. 292; *Pinto* v. *Santos*, 3 Taunt. 447; *Sims* v *Britain*, 4 B. & Ad. 375; *Baron* v. *Husband*, 4 B. & Ad. 611; *Ireland* v. *Thomson*, 4 C. B. 171; *Cobb* v. *Becke*, 6 Q. B. 930; *Robbins* v. *Fennell*, 11 Q. B. 248.

(*i*) *Hardman* v. *Willcock*, 9 Bing. 382, note; *Cheeseman* v. *Exall*, 6 Exc. 341.

(*k*) *Murray* v. *Mann*, 2 Exc. 538.

(*l*) Where he can set up the *jus tertii*, he must, of course, show a *complete* title in such third person, *Crosskey* v. *Mills*, 1 Cr. M. & R. 298. If it has not been asserted, or has been abandoned, by such third person, the servant or agent cannot rely upon it, *Betteley* v. *Reed*, 4 Q. B. 511. In trover the *jus tertii* may be given in evidence under a plea "not possessed," *Leake* v. *Loveday*, 4 M & G. 972; *Newnham* v. *Stevenson*, 10 C. B. 713; *Sheridan* v. *New Quay Company*, 28 L. J., C. P. 58.

(*m*) *Post*, Chap. VI.

(*n*) *Ogle* v. *Atkinson*, 5 Taunt. 759; see *Cheeseman* v. *Exall*, 6 Exc. 341; *Thorne* v. *Tilbury*, 27 L. J., Exc. 407; *S. C.* 3 H. & N. 534.

(*o*) *Evans* v. *Birch*, 3 Campb. 10; see *Atlee* v. *Backhouse*, 3 M. & W. 633.

(*p*) *Risbourg* v. *Bruckner*, 27 L. J., C. P. 90.

CHASTISEMENT OF SERVANT.

Master has no power to chastise servant of full age for breach of duty.

It is conceived, notwithstanding passages which may be found in the books *apparently* to the contrary (*q*), that no master (*r*) would be justified by the law of England even in moderately chastising a hired servant of full age for dereliction of duty; and that where the books speak of a master being justified in moderately chastising his servant or apprentice, they must be taken to apply only to the case of a servant or apprentice *under age* (*s*); and the only civil (*t*) remedies a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant are, to bring an action against him (*u*), or, as Puffendorf expressed it (*x*), "to expel the lazy drone from his family, and leave him to his own beggarly condition" (*y*). And the circumstances which justify the discharge of a servant will also sometimes justify the non-payment of his wages.

DISCHARGE OF SERVANT.

What causes will justify

It is difficult to lay down any general rule as to what causes will justify the discharge of a servant (*z*), which shall comprise

(*q*) I Hawkins P. C. lib. i. cap. 29, sect. 5, cap. 60, sect. 23; 3 Salk. 47; Burn's Justice, "Servant," sect. 9; Bac. Abr. "Master and Servant," (N.); Hale's Hist. P. C. 454. The cases of Villenage, 9 Rep. 76 *a;* Anon. 2 Mod. 167, would not apply to a hired servant. See Hob. 99; F. N. B. 168, P.; and Puff. de Off. Hom. ac Civ. lib. 2, cap. 4, sect. 2; and M. Barbeyrac's Note to Puff. Law of Nature and Nations, b. 6, c. 3, s. 4, note I; and Grot. lib. 2, cap. 26, s. 3.

(*r*) The master of a ship, however, has, by law, authority, in case of disobedience or disorderly conduct, to correct the mariners in a reasonable manner. See Abbott on Shipping, Part II., Ch. IV. s. 4; *Watson* v. *Christie*, 2 B. & P. 214; *Murray* v. *Moutrie*, 6 C. & P. 471; *R.* v. *Leggett*, 8 C. & P. 191; *Edward* v. *Trevellick*, 4 E. & B. 59; as to Passengers, *Noden* v. *Johnson*, 16 Q. B. 218; steward suspected of felony, *Broughton* v. *Jackson*, 18 Q. B. 378; *S. C.* 21 L. J., Q. B. 265. The case of mariners on board ship seems to be exceptional, but it is not confined to cases where the vessel is at sea. *Lamb* v. *Burnett*, 1 Cr. & J. 291.

(*s*) 1 Bl. Comm. 428; 2 Kent's Comm. 211; F. N. B. 168, L. 2, where it is said that battery of a servant is a good cause of departure. In pleading a justification of *moderate correction* of an apprentice, it is not usual to state that he was under age, 3 Ch. Pl. 321.

(*t*) See *post*, Chaps. VIII. and IX., as to criminal proceedings.

(*u*) F. N. B. 167; Dalt. Just. c. 58.

(*x*) Puff. on the Law of Nature and Nations, B. 6, c. 3, s. 4.

(*y*) In the present day no one would attempt to justify beating a servant for dereliction of duty; but Macaulay, Hist. Engl. vol. i. p. 424, says that in the 17th century masters well born and bred were in the habit of beating their servants.

(*z*) Apprentices, with whom a premium is given and who are bound by indenture, cannot be discharged for misconduct; the only remedy of the master (where correction fails) being by action on the covenants in the indenture, *Winstone* v. *Linn*, 1 B. & C. 460; *Wise* v. *Wilson*, 1 Carr. & K. 662; *Phillips* v. *Clift*, 4 H. & N. 168; *S. C.* 28 L. J., Exc. 153. But it would seem to be otherwise where the apprentice is entitled to a salary; see *Mercer* v. *Whall*, 5 Q. B. 447.

and be applicable to *all* cases; since whether or not a servant in any particular case was rightfully discharged, must of course often depend upon the nature of the services which he was engaged to perform, and the terms of his engagement. In fact the question in what case and upon what grounds an employer has the right to discharge a person employed by him has only been considered in modern times, and is not fully settled (*a*). It is conceived, however, that, according to the decisions upon the subject, the discharge of a servant may be justified for the following causes: the discharge of a servant.

I. Wilful disobedience of any lawful order of his master.
II. Gross moral misconduct, whether pecuniary or otherwise.
III. Habitual negligence in business, or conduct calculated seriously to injure his master's business.
IV. Incompetence, or permanent disability from illness.

It is proposed to treat of each of these separately. But it may be first mentioned that if a servant who is rightfully discharged refuse to quit his master's premises, his master would be perfectly justified in turning him out by force (*b*). But in all such cases it would, for obvious reasons, be more prudent to call in a constable or police officer for that purpose. Servant refusing to quit may be turned out by force.

I. Wilful disobedience of any lawful order of his master(*c*). Disobedience.

Where (*d*) a yearly servant to a farmer, who usually breakfasted at five a.m., and dined at two, one day refused to go with the horses to the marsh, which was a mile off, before dinner, dinner being then ready, saying that he had done his due, and would not go till he had had his dinner, whereupon his master told him to go about his business, and he went accordingly without offering to obey his master's orders; Lord Ellenborough held that the master was justified in dismissing him. *Spain* v. *Arnott*. Farm servant refusing to work at dinner time.

So where (*e*) the plaintiff, who had agreed with the defendant (under stat. 5 & 6 Will. 4, c. 19, ss. 2, 3) to serve as carpenter's mate of a vessel during a South Sea voyage, during the voyage mutinously refused to work the ship, except to an English port, whereupon he was put on shore at Java, and discharged, the defendant was held to be justified in discharging him. *Renno* v. *Bennett*. Refusal to work ship except to certain port.

Again, it has been held (*f*), that a master was justified in dismissing a housemaid, who persisted in leaving his house contrary to his orders, although she went to visit a sick and dying mother. Lord Wensleydale saying, "It was laid down by Lord Ellenborough, in *Spain* v. *Arnott* (*g*), and by me in *Callo* v. *Turner* v. *Mason*. Housemaid persisting in leaving the house

(*a*) *Per* Lord Wensleydale in *Lomax* v. *Arding*, 10 Exc. 736.

(*b*) See *Donaldson* v. *Williams*, 1 Cr. & M. 345.

(*c*) As to the proper mode of pleading a discharge for disobedience of lawful orders, see, in addition to the cases mentioned in the text, *Powell* v. *Bradbury*, 7 C. B. 201; *Lush* v. *Russell*, 5 Exc. 203; *S. C.* 1 L. M. & P. 369.

(*d*) *Spain* v. *Arnott*, 2 Stark. 256; *Callo* v. *Brouncker*, 4 C. & P. 518 (see *Fischer* v. *Aide*, 3 M. & W. 486); *Amor* v. *Fearon*, 9 A. & E. 548.

(*e*) *Renno* v. *Bennett*, 3 Q. B. 768.

(*f*) *Turner* v. *Mason*, 14 M. & W. 112; *S. C.* 2 D. & L. 898.

(*g*) 2 Stark. 256. See this case, *supra*.

without permission.

Brouncker (*h*), and confirmed by the Court of Queen's Bench, in *Amor* v. *Fearon* (*i*), that the wilful disobedience of any lawful order of the master is a good cause of discharge. Here the plea discloses a perfectly lawful order, namely, that the defendant should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. *Primâ facie* the master is to regulate the times when his servant is to go out from, and return to, his house. Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her. But the replication states nothing to show that the defendant had any notice or knowledge of the mother's illness."

Lilley v. *Elwin*.

Farm servant refusing to work during harvest without beer.

And similar principles were laid down in a case (*k*) in which the plaintiff was engaged as a waggoner to the defendant, but during the harvest worked in the field generally. The practice was, during harvest, to work till eight o'clock in the evening. The plaintiff refused to work till that hour, not as being an unreasonable hour, or as not being within the terms of his contract, but because strong beer of good quality was not allowed to him, according to a custom which he alleged to exist, but could not prove. The beer supplied being, as he contended, very bad small beer, not so good as water; whereupon the defendant refused any longer to employ the plaintiff, and took him before a magistrate, who discharged him, and he brought his action against the defendant. But it was held that the defendant had a right to discharge him, and must be taken to have exercised that right by ordering him not to return, taking him before a magistrate, and acquiescing in the magistrate's order of discharge.

Disobedience causing loss.

However, where the plea to an action for wrongful dismissal sets up as an excuse *disobedience* of orders *causing loss*, it is not sufficient to show disobedience which did not occasion a loss (*l*).

Obstinate refusal.

And a mere obstinate refusal to work will not, of itself, justify the dismissal of a servant, as it might be an obstinate refusal to do an unlawful act (*e. g.*, to work at trade on Sunday) (*m*).

Moral misconduct.

II. Gross moral misconduct, whether pecuniary or otherwise (*n*).

Robbery.

Thus, if a servant robs his master, he may, although a

(*h*) 4 C. & P. 518.

(*i*) 9 A. & E. 548. See this case, *post*, p. 80.

(*k*) *Lilley* v. *Elwin*, 11 Q. B. 742, 756.

(*l*) *Cussons* v. *Skinner*, 11 M. & W. 161.

(*m*) *Jacquot* v. *Bourra*, 7 Dowl. 348.

(*n*) *Callo* v. *Brouncker*, 4 C. & P. 518. See *Burgess* v. *Beaumont*, 7 M. & G. 962, where a plea, imputing general immorality and dishonesty to a governess, was held too vague and uncertain, and a demurrer on that ground was allowed.

month's notice is required, dismiss him without any notice, and need not pay him any wages (*o*).

And if a servant habitually embezzle his master's property, the amount embezzled is wholly immaterial; and although the arrears of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to anything (*p*). Embezzlement.

And where (*q*) the accountant to a company received money for which he did not account, and falsified the accounts furnished by him, his employers were held justified in dismissing him, although they did not assign that as the cause of his dismissal. *Baillie* v. *Kell.* Accountant falsifying accounts.

Upon similar principles it has been held, that a clerk and traveller, at 80*l.* a year, who lived and boarded in his master's house, was rightfully dismissed for assaulting his employer's maid servant, with intent to ravish her (*r*). And it is said that a maid servant being with child (*s*), or a man servant being the father of a bastard child (*t*), is a good cause of discharge. *Atkin* v. *Acton.* Clerk attempting to ravish maid servant.

And it would probably be held, that a street-keeper or other officer receiving gratuities for conniving at the breach of regulations, which it was his duty to enforce, might properly be dismissed for so doing (*u*). And drunkenness would also be a justifiable cause of discharge, if pleaded (*v*). Street-keeper receiving gratuities for connivance at breach of rules. Drunkenness.

III. Habitual negligence in business, or conduct calculated seriously to injure his master's business.

Upon this ground, in an action for a month's wages by a servant who was dismissed without warning, on the ground that he was negligent in his conduct, frequently absent when his master wanted him and often slept out at nights, Lord Kenyon held that the plaintiff was not entitled to recover on account of his misconduct. And, in another case (*x*), Lord Wensleydale said, "That for habitual neglect the defendant was at liberty to part with the plaintiff." And, in another (*y*), Park, J., observed, "If a servant is negligent in his business, and injures his master, I am not prepared to say that the master may not dismiss him, as if he were kept it might be very injurious, as he might do the business very carelessly when he knew he was not to be kept longer." Upon these principles, the foreman to silk manufacturers was held to be rightly discharged (and, moreover, liable to an action), for advising and assisting an apprentice to quit their service and go to America (*z*). And the clerk to a company was held to be rightly dismissed for entering in a minute-book a protest, in his own handwriting, against Negligence. *Turner* v. *Robinson.* Advising apprentice to quit. *Ridgway* v. *The Hunger-*

(*o*) *Per* Park, J., in *Cunningham* v. *Fonblanque*, 6 C. & P. 49.

(*p*) *Brown* v. *Croft*, 6 C. & P. 16, note; and see *Spotswood* v. *Barrow*, 5 Exc. 110.

(*q*) *Baillie* v. *Kell*, 4 Bing. N. C. 638.

(*r*) *Atkin* v. *Acton*, 4 C. & P. 208.

(*s*) Cald. 11.

(*t*) *R.* v. *Welford*, Cald. 57.

(*u*) See *Bogg* v. *Pearse*, 10 C. B. 534; *S. C.* 2 L. M. & P. 21.

(*v*) *Speck* v. *Phillips*, 5 M. & W. 279; *Wise* v. *Wilson*, 1 C. & K. 662, *post*, p. 81.

(*x*) *Robinson* v. *Hindman*, 3 Esp. 235.

(*y*) *Callo* v. *Brouncker*, 4 C. & P. 518.

(*z*) *Turner* v. *Robinson*, 5 B. & Ad. 789.

ford Market Company.

a resolution of the directors, calling a meeting to appoint his successor, as such an act was inconsistent with his service (*a*).

Lacy v. *Osbaldiston.*

Acting manager of theatre guilty of conduct likely to injure it.

So in an action by the acting manager of Covent-garden theatre, for wrongful dismissal from his situation, &c. (*b*); to which, amongst other pleas, the defendant pleaded that the plaintiff's conduct was calculated to prejudice the interests of the theatre: Vaughan, J., said, "It is a question of fact, whether the plaintiff was so conducting himself as that it would have been injurious to the interests of the theatre to have kept him (*c*). If he was, I should have no difficulty in saying that it would be good ground of dismissal."

Read v. *Dunsmore.*

Master builder dismissing carpenter for poaching on employer's premises.

Again, where (*d*) the defendant, a master builder, dismissed the plaintiff, a journeyman carpenter, for poaching on the premises of Mr. T., a gentleman for whom the defendant was working, and at whose premises the plaintiff was engaged working, Coleridge, J., in leaving the question to the jury whether or no this was just ground of dismissal, said, "In dealing with this question, I think that you ought to consider what Mr. T. had a right to expect from the defendant and his men. If a gentleman engages a tradesman who has several workmen under him, he has a right to expect that the workmen will conduct themselves well. It is said that they did no damage; but I do not think that it entirely depends on that, because it might have been, that Mr. T. might have said, 'I will not allow the workmen to go into my garden,' and if they had done so, they would have done no actual damage; but, still, if the defendant employed persons who acted in that way, he would soon find that he was injured in his business, and would lose his custom, because gentlemen would not engage him."

Amor v. *Fearon.*

Clerk claiming to be partner.

So a wine merchant (*e*) was held justified in dismissing a clerk, at a yearly salary, who also, at certain periods, received a portion of the profits (but this, as the master alleged, was a mere gratuity), for claiming to be a partner, as he thereby disclaimed being a servant.

Cussons v. *Skinner.*

Manager of company ac-

And it was said by Lord Abinger (*f*), that the accepting of an undrawn bill of exchange, in blank, by the manager of a cotton company, was wrong, and would have been a very jus-

(*a*) *Ridgway* v. *The Hungerford Market Company*, 3 A. & E. 171.

(*b*) *Lacy* v. *Osbaldiston*, 8 C. & P. 80.

(*c*) And see *The East Anglian Railway Company* v. *Lythgoe*, 2 L. M. & P. 221.

(*d*) *Read* v. *Dunsmore*, 9 C. & P. 588.

(*e*) *Amor* v. *Fearon*, 9 A. & E. 548. See also *Greenham* v. *Gray*, *ante*, p. 36; and *Mercer* v. *Whall*, 5 Q. B. 447, where, to an action of covenant by an articled clerk against a solicitor for dismissing him, the defendant pleaded that the plaintiff conspired to induce the defendant's clients to leave him, and disclosed his professional secrets. See also in *Hobson* v. *Cowley*, 27 L. J., Exc. 205, a plea that plaintiff, whilst in defendant's service, entered into negotiations for carrying on the same business as defendant without his consent.

(*f*) In *Cussons* v. *Skinner*, 11 M. & W. 170. The decision in that case, however, did not turn on this point.

tifiable cause of discharging him the next day after it was discovered (*g*).

cepting bill in blank.

But it has been held (*h*), that a schoolmaster was not justified in discharging the plaintiff, a teacher of French and drawing, for not returning to the school for two days after the vacation, as it did not appear that the plaintiff had been guilty of any immorality, nor that the defendant was obliged to hire another person, or that the plaintiff's department was not, in fact, adequately filled, nor that the instructions in French or drawing were impeded, or that the business of the school was suspended for a single hour.

Filleul v. *Armstrong.*

French master not returning for two days after vacation.

And where (*i*) a surgeon by a written agreement, not under seal, agreed with the plaintiff, in consideration of a premium of 50*l.*, to take her son, a young man seventeen years old, as pupil and assistant for three years, to assist him in his studies, to allow him to attend lectures, and to provide him with board and lodging, but dismissed him in consequence of his coming home drunk about five times, and on some occasions, when he came home late, desiring the shop-boy to make up the medicines, Lord Denman, in summing up to the jury, said, "There is a great distinction between a contract of apprenticeship and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves. This is a mixed case, something between that of apprenticeship and service. The plaintiff's son goes to the defendant to render assistance to him in his business, although he is also to pursue his studies; and as a justification of his dismissal, the defendant has pleaded not that the plaintiff's son did not perform all things on his part to be performed, but that he did things injurious to the defendant's practice, and so misconducted himself as to be dangerous to the defendant's practice as a surgeon. It is proved beyond all doubt that, on some occasions, the plaintiff's son came to the defendant's house intoxicated, but I think that that alone would not justify the defendant in dismissing him. It is also proved that, on several occasions, in consequence of the plaintiff's son coming home late, he could not compound the medicines, and employed the shop-boy to do it. Now, I think, this affords matter for serious consideration, *and if you think that from this conduct of the plaintiff's son real danger was occasioned to his master's business*, you ought to find your verdict for the defendant, as *the defendant was then, in my opinion, justified in dismissing him.*" But the plaintiff had a verdict.

Wise v. *Wilson.*

Surgeon's assistant getting drunk and making shop-boy mix medicines.

(*g*) And see *The East Anglian Railway Company* v. *Lythgoe*, 2 L. M. & P. 221, where a clerk to a railway company was dismissed for disclosing accounts of the railway to another company; but, under the circumstances of the case, the County Court judge thought him entitled to his salary up to his discharge.

(*h*) *Filleul* v. *Armstrong*, 7 A. & E. 557.

(*i*) *Wise* v. *Wilson*, 1 Carr. & K. 662; see *Phillips* v. *Clift*, 4 H. & N. 168; *S. C.* 28 L. J., Exc. 153.

Smith v. *Thompson.*

Clerk to shipping agent applying money given for business purposes to his own salary.

And where (*k*) the plaintiff was engaged as clerk to the defendant, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton, and in the course of his employ it was his duty to pay freight, dock dues, &c., to meet which the defendant remitted money. On one occasion the plaintiff wrote to the defendant for 140*l.*, inclosing an account of the purposes for which it was required, one of them being the payment of 30*l.* salary due to himself. Ten days afterwards the defendant sent the plaintiff 100*l.* in a letter, directing him to apply the money for "business purposes," and he applied 30*l.* in payment of his own salary, whereupon the defendant discharged him, and the plaintiff brought his action for wrongful discharge. At the trial the judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper appropriation of the money, or of disobedience of orders. And it was held by the Court of Common Pleas to have been properly so left, and that the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of the plaintiff, that he should have been guilty of any moral turpitude.

Lomax v. *Arding.*

Manager of ironworks not trying to promote master's interests.

And where (*l*) the plaintiff agreed with the defendant to serve him for three years as manager of certain ironworks, at a salary of 4*l.* per week, upon the terms that the plaintiff would during that time use his best endeavours to promote the interest of the defendant, and attend to and carry out all reasonable requests made to him by the defendant, a plea that the plaintiff did not, while he was in the defendant's employ under the agreement, use his best endeavours to promote the interest of the defendant according to the agreement, therefore the defendant dismissed the plaintiff, and refused to pay him any salary after such dismissal, was held a good plea to an action for wrongful dismissal. In that case, Pollock, C. B., said, "Suppose the plaintiff had conducted himself on all occasions in a negligent and lazy spirit, there may be insuperable difficulty in a legal definition of the plaintiff's conduct, and yet the defendant would be justified in discharging him from his service. It would be a question of evidence."

Bray v. *Chandler.*

Agent forbidden to receive money receiving it.

Where, by an agreement in writing, A. was appointed surveyor or agent of B. for two years and a half, at a salary of 200*l.* a year, and a commission on every house let by him for B., and the agreement expressly provided that under no pretence whatsoever should A. be considered B.'s agent to receive any money on his account: it was held that A. having received deposit money from persons to whom he had let houses for B., was a good defence to an action for dismissing A. before the end of the term (*m*).

Cross action when necessary.

If, however, the servant's misconduct be not such as to go to the *whole consideration* of the contract on the part of the master, he will not be justified in dismissing the servant, but must, if necessary, resort to a cross action against the servant.

(*k*) *Smith* v. *Thompson*, 8 C. B. 734.

44.

(*l*) *Lomax* v. *Arding*, 10 Exc. 718.

(*m*) *Bray* v. *Chandler*, 18 C. B.

Gould v. *Webb.*

Newspaper correspondent omitting to send news letter, and overdrawing for salary, no ground of discharge.

Where, therefore (*n*), to an action for wrongfully discharging the plaintiff from the defendant's employ, as European correspondent of a newspaper, at a salary, the defendant pleaded, firstly, that the engagement was made upon the terms and condition that the plaintiff should, by every steamer from Liverpool to New York, forward a letter containing European news, but plaintiff wrongfully neglected to forward any letter containing such news by several steamers that sailed from Liverpool to New York, wherefore defendant discharged him; and also, secondly, that defendant employed plaintiff upon the terms and condition that plaintiff might draw bills upon defendant for the amount of his salary as it should become due, but not for any sum not due: but plaintiff wrongfully drew on defendant and negotiated bills for sums not due, which were presented to defendant and dishonored to the damage of defendant's credit, wherefore defendant discharged plaintiff. Both pleas were held bad on demurrer, as not showing a default by plaintiff going to the whole consideration of defendant's contract. The breach of the *stipulations* on the part of the plaintiff did not amount to such misconduct as to authorize the defendant to discharge him. It might have been that there was no news to send; and the second plea would be satisfied by proof that the plaintiff had drawn a bill for half-a-crown too much.

If good ground of discharge exist and is known to the master, it is sufficient to justify the discharge; although different ground alleged.

Aliter, if not known to exist.

Spotswood v. *Barrow.*

Where an act of wilful disobedience of a lawful order, or other misconduct on the part of a servant which would justify his master in discharging him, is known to the master at the time he discharges him, although he does not insist on that as the precise ground of discharge, or even if he allege some other ground of discharge; yet the master may afterwards, by showing that the fact existed, and that he knew it, justify such discharge on that ground (*o*). But it would seem that if the master, at the time he discharged the servant, did *not know* of any act of misconduct on the part of the servant which would justify his discharge, although such fact existed, the mere existence of the fact would not justify the discharge (*p*). In a case, however, in which a traveller and salesman brought an action for wrongful dismissal, and the defendant pleaded in justification that the plaintiff had received money from the defendant's customers and embezzled it, wherefore he discharged him; to which the plaintiff replied *de injuriâ*, and it appeared in evidence that the defendant did not know of the embezzlement when he discharged the plaintiff, it was held that *on these pleadings* the judge who tried the case was wrong in leaving it to the jury to say whether the defendant discharged the plaintiff for that cause, as the defendant's motive was not in issue (*q*).

IV. Incompetence, or permanent disability from illness.

Incompe-

Where a servant of any sort is engaged on account of his skill

(*n*) *Gould* v. *Webb*, 4 E. & B. 933.

(*o*) *Baillie* v. *Kell*, 4 Bing. N. C. 638; *Ridgway* v. *Hungerford Market Company*, 3 A. & E. 171; *Cussons* v. *Skinner*, 11 M. & W. 161; *Mercer* v. *Whall*, 5 Q. B. 447.

(*p*) *Cussons* v. *Skinner*, *ubi supra.*

(*q*) *Spotswood* v. *Barrow*, 5 Exc. 110.

tence good ground of discharge.

Harmer v. *Cornelius.*

or peculiar ability to perform certain duties, and turns out to be perfectly unskilful and incompetent to discharge the duties for which he was hired, the master will be justified in rescinding the contract and discharging the servant. Thus, where in an answer to an advertisement in a newspaper for scene-painters, the plaintiff applied to the defendant, a correspondence ensued, and the defendant ultimately hired the plaintiff in that capacity, but he turned out to be quite incompetent, and was discharged. It was held that such incompetence was a valid reason for discharging him, and in an action brought as for a wrongful discharge, the defendant succeeded (*r*). In giving judgment for the defendant in that case, Willes, J., said:

"Where a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—'*spondes peritiam artis.*' Thus, if an apothecary, a watchmaker, an attorney, be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill (*s*). An express promise or express representation in the particular case is not necessary. It may be, that if there is no general and no particular representation of ability and skill the workman undertakes no responsibility. If a gentleman, for example, should employ a man that is known never to have done anything but sweep a crossing to clean or mend his watch, the employer probably would be held to have incurred all risk himself. But in the case under consideration, the correspondence shows, in addition to the implied representation, an express and particular representation by the plaintiff that he did possess the requisite skill. The next question is this: supposing that when the skill and competency of the party employed are tested by the employment he is found to be utterly incompetent, is the employer bound, nevertheless, to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? This is a question upon which we have been furnished by the bar with no authority, probably because such labour being seldom retained for a long term certain, the question has not often arisen. But it seems very unreasonable that an employer should be compelled to go on employing a man who having represented himself competent turns out to be incompetent. An engineer is retained by a railway company to drive an express train for a year, and is found to be utterly unskilful or incompetent to drive or regulate the locomotive, are the railway company still bound, under pain of an action, to entrust the lives of thousands to his dangerous and demonstrated incapacity? A clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant not only of bookkeeping but of arithmetic, is the merchant bound to continue him in his employment? Misconduct in a servant is, according to every day's experience, a justification of a discharge. The failure to afford the requisite skill which

(*r*) *Harmer* v. *Cornelius*, 28 L. J., C. P. 85.

(*s*) See *Jenkins* v. *Betham*, 15 C. B. 188.

had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct. The rule of the civil law—'*Imperitia culpæ adnumeratur*' applies. We may add that a precedent of a plea grounded on the implied condition of competency, is to be found in the late Mr. Joseph Chitty's book on Pleadings, edited by the late Mr. Pearson, p. 363. So in *Spain* v. *Arnott* (*t*), Lord Ellenborough, speaking of a servant who had refused to perform his duty, says, 'The master is not bound to keep him on as a burthensome and useless servant to the end of the year;' and it appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired."

Cuckson v. *Stones.*

Temporary illness no suspension of wages under a permanent contract not rescinded.

But where (*u*) the plaintiff, having entered into an agreement that he should serve the defendant and W. for ten years in the capacity of a brewer, and teach them to brew; that the defendants and W. were to pay the plaintiff 20*l.* on the execution of the agreement, to find him a house, and to supply him with coals for the ten years, and to pay him the weekly sum of 2*l.* 10*s.* during that term. He served the defendant and W. till W.'s death, and afterwards worked for defendant up to Christmas, 1857, when he was taken ill. He was confined to his bed till March, and was unable to attend to his work till 19th July, 1858, when he was again employed about the brewery, and paid as before. During his illness he was from time to time consulted by the defendant as to the mode of brewing, but was unable to do any actual work for defendant; and it was admitted that the *contract had not been rescinded.* It was held that the plaintiff was entitled to recover under it the wages for the time during which he was disabled by sickness from working; although a plea to the claim for wages that the plaintiff was not during the time in question ready and willing or able to render, and did not in fact render, any service, was held on demurrer to be a good plea in point of law, in the sense that the plaintiff voluntarily and wilfully refused or omitted to serve.

Contract might be rescinded if servant permanently disabled by illness.

And in giving judgment, Lord Campbell said: "We concur in the observations of Willes, J., in *Harmer* v. *Cornelius*, and if the plaintiff from unskilfulness had been wholly incompetent to brew, or by the visitation of God had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendants, we think that the defendants might have determined the contract. He could not be considered incompetent by illness of a temporary nature. But if he had been struck with disease so that he could never be expected to return to his work, we think the defendants might have dismissed him and employed another brewer in his stead. Instead of being dismissed he returned to the service of the defendants when his health was restored, and the defendants employed him, and paid him as before. At the trial the defendants' counsel admitted that the contract was not rescinded. The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and

(*t*) 2 Stark. 256.
(*u*) *Cuckson* v. *Stones*, 28 L. J., Q. B. 25.

inability to work. It is allowed that under this contract there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force we see no difference between his being so disabled for a day, or a week, or a month."

2. AS BETWEEN THE MASTER AND THIRD PERSONS.

Remedies of master by action against third persons for depriving him of services of servant.

A master may maintain an action against any person who deprives him of the services of his servant, either by enticing him away from his master (*x*), or by harbouring and detaining him after having been apprised of the former contract (*y*); or by beating, confining or disabling him; or by seducing a female servant (*z*). The master may also, where wages have been earned by a servant enticed away or harboured by another person, waive his right of action for such tortious act, and sue for the earnings of his servant. In all these cases the master's right of action arises out of the property which he has acquired, by the contract of hiring, in the labour of his servant; and in all of them, except the action for his servant's earnings, the gist of the action is the loss of service, without an allegation of which no action can be sustained by a master, however great the injury to his servant (*a*). Whilst, therefore, on the one hand, a mere attempt to deprive a master of the services of his servant without any damage following upon it would not give the master a right of action (*b*), so, on the other, it has been held that a master, who has recovered in an action against the servant a stipulated penalty for leaving his service, cannot maintain an action against the person who induced him to leave (*c*). Moreover, the loss of service must be the natural and necessary consequence of the defendant's act, otherwise the master cannot maintain any action. Where, therefore, the director of certain oratorios had, at considerable expense, engaged one Mara, who, in consequence of a libel published by the defendant, refused to sing, being afraid of being hissed; Lord Kenyon held that the plaintiff could not maintain an action against the defendant, as the injury complained of was too remote, and impossible to be connected with the cause assigned for it (*d*).

Loss of service gist of such action;

and must be the necessary consequence of defendant's act.

(*x*) F. N. B. 91, I., 167 B.

(*y*) F. N. B. 168, Winch, 51.

(*z*) Com. Dig. Trespass, B. 5; Pleader, 3 M. 11.

(*a*) *Robert Mary's Case*, 9 Rep. 113 *a*; *Poley* v. *Osborn*, cited 10 Rep. 130 *b*; *Hanbury* v. *Ireland*, Cro. Jac. 618; *Chamberline* v. *Harvey*, 5 Mod. 182; *S. C.* 1 Lord Raym. 146; *Hall* v. *Hollander*, 4 B. & C. 660; *Grinnell* v. *Wells*, 7 M. & G. 1033; *S. C.* 2 D. & L. 610; *Eager* v. *Grimwood*, 1 Exc. 61; *Davis* v. *Williams*, 10 Q. B. 725. That the allegation of service under a *per quod servitium amisit* is sufficient on general demurrer, see 4 D. & L. 258.

(*b*) *Per* Lord Mansfield in *Bird* v. *Randall*, 3 Burr. 1352.

(*c*) *Bird* v. *Randall*, *ubi supra*. *Sed quære*, see *post*, p. 89.

(*d*) *Ashley* v. *Harrison*, 1 Esp. 48; *S. C.* Peake. 194; that was an action for *libel*. And see *Taylor* v. *Neri*, 3 Esp. 386.

OF THE ACTION FOR ENTICING AWAY A SERVANT.

Indictment will not lie;

An indictment will not lie for enticing an apprentice or servant away from his master, it being only a private injury, which may be redressed by a civil action (*e*). The Court, however, will not, on motion, quash such an indictment (*f*); but the defendant must plead demur, or move in arrest of judgment (*g*). But an agreement to induce and persuade workmen under contract of servitude for a time certain to absent themselves from such service, is an indictable offence, although no threats or intimidation be proved, or any ulterior object averred (*h*). And so is a conspiracy to obstruct a man in carrying on his business, by persuading his workmen to leave him, in order to induce him to make a change in the mode of carrying on his business (*i*).

but will for conspiracy.

Action will lie.

And if one take away my apprentice or servant by force, an action of trespass will lie (*k*); but if he merely entice him to leave and he do leave, an action on the case is the proper remedy (*l*). A mere attempt to entice a servant away without any damage following would not, however, entitle the master to maintain an action (*m*). But it is no objection to such an action that the servant was only a journeyman, who worked by the piece, if he were the plaintiff's servant (*n*). A man, however, who lived in his own house, and took in work for different people, could scarcely be called the journeyman of any particular master (*o*).

Mere attempt will not support action.

What sort of servants this action applies to.

A question has been raised as to what sort of servants this action may be brought for the seduction of. And it has been held by three judges of the Court of Queen's Bench (*p*), that

(*e*) *R.* v. *Daniel*, 6 Mod. 99, 182; *S. C.* 1 Salk. 380; *S. C.* 2 Lord Raym. 1116; Com. Dig. Indictment, G. 3; see 5 Geo. 4, c. 97, which repealed various statutes for preventing the seducing and enticing artificers and workmen to leave their employ and go to foreign parts.

(*f*) Trin. 13 Will. 3, B. R.; see *R.* v. *Bilton*, 1 Salk. 372.

(*g*) As in *R.* v. *Daniel, ubi supra.*

(*h*) *R.* v. *Rowlands*, 5 Cox C. C. 466.

(*i*) *R.* v. *Duffield*, 5 Cox C. C. 404; and see *R.* v. *Selsby, ib.* 495, note.

(*k*) *R.* v. *Daniel, ubi supra; Reaveley* v. *Mainwaring*, 3 Burr. 1306; *Gilbert* v. *Schwenck*, 14 M. & W. 488; where it was held that one testamentary guardian was not justified in taking an infant ward out of the *lawful service* of another testamentary guardian.

(*l*) *R.* v. *Daniel, ubi supra*; see *Hambleton* v. *Veere*, 2 Wms. Saund. 170.

(*m*) *Bird* v. *Randall*, 3 Burr. 1352.

(*n*) *Hart* v. *Aldridge*, Cowp. 54; *Blake* v. *Lanyon*, 6 T. R. 221.

(*o*) *Hart* v. *Aldridge*, Cowp. 54.

(*p*) *Lumley* v. *Gye*, 2 E. & B. 216: where it was held that an action lay for seducing a dramatic performer away from plaintiff's theatre. Coleridge, J., in support of his judgment, refers to the 2nd section of the Statute of Laborers and the form of writ given by Fitzherbert, N. B. 167, B, as always reciting the statute. But the first writ given by Fitzherbert is founded upon the 3rd section of the statute, and is to recover the *penalty* there given

an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced, or is only *in fieri*, provided the procurement be during the subsistence of the contract, and produces damage, and that to sustain such an action it is not necessary that the employer and employed should stand in the strict relation of master and servant. Coleridge, J., however, dissented, and in a long judgment, which deserves an attentive perusal, gave elaborate reasons for holding that the action was founded on the Statute of Laborers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was within that statute; and that in all other cases the remedy for a breach of contract is only on the contract, and against those privy to it.

Scienter.

To support this action, it is necessary to prove that the defendant *knew* the person to be the plaintiff"s servant (*q*); but not to particularize the means of enticement (*r*). There must also be a binding contract of service between the servant and his first master, or the plaintiff will fail (*s*); unless, perhaps, in the case of interruption of an actual subsisting service (*t*). But the mere circumstance that the servant is an infant, and the contract therefore voidable, will not defeat the action (*u*). This action will not lie for inducing a servant to leave his master's service at the expiration of the time for which he was hired,

Binding contract.

Service de facto.

When this action will not lie.

to the party grieved. The other writs are against the *servant*, and it would hardly be contended at the present day that *such* actions must be confined to the class of servants referred to by the Statute of Laborers. It would seem also from the rule given in Lutw. 1548, that the mere recital of the statute would not show that the action lay not at common law. It is there said that where an action lay both at common law and by statute, if you proceed under the statute you must recite the statute, for "without rehearsal, *non patet*, whether he uses the action by the common law, *sicut potest*, or the action on the statute." It is also added, "If there were no action at common law, the statute should be rehearsed." So the recital of the statute in a writ does not *prove* that the action did not lie at common law, but only that the plaintiff is not using the action at common law, in this instance. Thus leaving the matter where it was. Again, it may be asked, if this form of action is founded entirely upon the Statute of Laborers, why did it not cease when that statute was repealed, 5 Eliz.? Moreover, if the judgment of Coleridge, J., is right, what becomes of the common action for seduction of a daughter and servant? Is that to be only brought in cases within the Statute of Laborers? It is notoriously otherwise.

(*q*) *Fores* v. *Wilson*, Peake, 55.

(*r*) *Winsmore* v. *Greenbank*, Willes, 582.

(*s*) *Sykes* v. *Dixon*, 9 A. & E. 693; and see *Gye* v. *Felton*, 4 Taunt. 876; *Pilkington* v. *Scott*, 15 M. & W. 657; *Hartley* v. *Cummings*, 5 C. B. 247.

(*t*) See *per* Lord Denman, in *Sykes* v. *Dixon*, *ubi supra*; and *per* Maule, J., in *Hartley* v. *Cummings*, *ubi supra*; and see Y. B. 22, Hen. 6, 30; *Barber* v. *Dennis*, 6 Mod. 69; *Keane* v. *Boycott*, 2 H. Bl. 511.

(*u*) *Keane* v. *Boycott*, *ubi supra*, and see 7 T. R. 310, 314.

although the servant had otherwise no intention of leaving his master (*x*).

It was also held by Lord Mansfield, in *Bird* v. *Randall* (*y*), that this action would not lie after the master has recovered from the servant a stipulated penalty for leaving the service, upon the ground, that if the seducer, or second master who employs the servant after the servant has paid the penalty, were to be liable to damages in an action brought by the first master for so doing, this would finally fall upon the servant, and in effect be an addition to the penalty; for the second master would pay the servant for his service no more than he estimates it to be worth *to him;* and if he must pay a sum of money to the first master for damages for entertaining his servant, he will make his bargain with the servant in such manner as to pay him so much the *less*. And Lord Ellenborough said (*z*), he remembered Wilson, J., ruling the same point at Nisi Prius upon the dry authority of the former decision, though, as it seemed to him, with considerable doubts upon his mind as to the propriety of it. But Lord Ellenborough said he never could entirely comprehend the ground on which *Bird* v. *Randall* proceeded. "It was assumed," said he, "that the sum taken as the penalty from the servant, was the extreme limit of the injury sustained by the master; but there is the doubt: for the penalty might have been so limited, because of the inability of the servant to undertake to pay more, and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him." And upon Lawrence, J., observing, "I suppose the Court proceeded upon the ground that the penalty was by the express stipulation of the parties made an equivalent for the loss of the service;" Lord Ellenborough added, "That is so *as between the parties themselves;* but it may admit of doubt whether that were the fair way of considering it as against a stranger, a wrongdoer."

Bird v. *Randall.*

Not after payment by servant of penalty for leaving.

Sed quære.

It is conceived that, in the event of the death of the wrongdoer, this action, and also that for harbouring a servant, might be brought against his executors or administrators, under 3 & 4 Will. 4, c. 42, s. 2, within six calendar months after they have taken upon themselves the administration of his estate, if the injury were committed within six calendar months before his death.

On death of wrongdoer.

OF THE ACTION FOR HARBOURING A SERVANT.

Where a person, *after notice*, continues to employ another man's servant, that other may maintain an action against him, although, at the time he hired him, the second master did not

After notice.

(*x*) *Nichol* v. *Martin*, 2 Esp. 734.

(*y*) 3 Burr. 1345; *S. C.* 1 W. Bl. 373, 387; see *Cooper* v. *Shepherd*, 3 C. B. 266; *S. C.* 4 D. & L. 218; *Buckland* v. *Johnson*, 15 C. B. 145.

(*z*) In *Godsall* v. *Boldero*, 9 East, 78.

know that he was hiring another man's servant; and, therefore, no action would lie for enticing him away (*a*).

Blake v. *Lanyon.*

Thus, where (*b*) one Hobbs, who was retained by the plaintiff, a currier, to work by the piece, left the plaintiff's service on a dispute between them, and at the time of departure had some work in hand; he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff. A few days afterwards, the defendant having been apprised by the plaintiff that Hobbs was his servant, and had left his work unfinished, and being threatened with an action, in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work. This Hobbs refused to do, and the defendant continued him in his service, whereupon the plaintiff brought his action for enticing Hobbs away, and harbouring him after notice. No evidence was given in support of the charge of enticing away, and it was contended, on the part of the defendant, that no action could be maintained for continuing to employ Hobbs after notice, as at the time the defendant engaged him, he did not know he was the plaintiff's servant, but the objection was overruled. And *per Curiam*, an action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away.

This cause of action, however, is generally joined with that for enticing away a servant, and the observations on that form of action apply to this also.

The action for harbouring the plaintiff's servants will not lie against the captain of an English ship, to which the plaintiff's slaves had escaped, for refusing to give them up to the plaintiff (*c*).

OF THE ACTION BY A MASTER FOR THE EARNINGS OF HIS SERVANT.

Master entitled to servant's earnings.

A master deprived of the services of an apprentice or servant, who has been enticed away and harboured by another master, is not confined to an action for damages for the injury he has sustained by the loss of his servant. He may, in some cases, waive the tort, and bring an action to recover the wages due to his apprentice or servant from such second master; the maxim in such cases being *quicquid acquiritur servo acquiritur domino* (*d*). This rule of law had formerly a much more extensive signification than it now has; for during the existence of

(*a*) *Fawcet* v. *Beavres*, 2 Lev. 63; *Fosset* v. *Brver*, 3 Keb. 59; probably *S. C.*

(*b*) *Blake* v. *Lanyon*, 6 T. R. 221.

(*c*) *Forbes* v. *Cochrane*, 2 B. & C. 448. See *Smith* v. *Gould*, 2 Salk. 667, as explained by Hargrave in his argument in *Sommersett's case*, 20 How. St. Tr. 65, note.

(*d*) See Barrington on Stat. 276; Co. Litt. 117 *a*, note 1; Peake's Add. Cas. 121, note; Story on Ag. 421; Paley on Ag. 339; Grot. lib. 3, cap. 7, sec. 4, 2. The French maxim was "*Qui a le vilain, il a sa proye;*" *vide* 20 How. St. Tr. 36, note.

villenage, whatever was acquired by the villein, whether realty or personalty, became the property of his lord under certain qualifications (*e*). But even now the rule holds in some degree with respect to apprentices and servants, though with a great difference in point of extent and application, for the relation of an apprentice and servant to the master is more mild and limited than that of a villein to his lord, and only imports that the master shall be entitled to their personal labour during the time stipulated either in a particular way, or generally according to the nature of the apprenticeship or service. Consequently the master cannot claim any other acquisitions than such as are the result of that labour (*f*). What the apprentice or servant earns by his labour whilst he remains with the master, or is actually working for him, falls so clearly within this principle, that there can be no room for doubt (*g*). Nor can there be any where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. Most of the cases upon this subject relates to apprentices in a seafaring way, whose wages and prize-money (*h*) as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle which governs them seems to apply to apprentices and servants in general, and has indeed been extended so far as to give the master a right to the wages or earnings, whether the service is performed by the apprentice with or without the master's licence; and even though the earnings accrue in a trade or service different from that to which the apprentice is bound (*i*).

When working for his master; or with his knowledge and consent.

When working without his master's licence.

Thus, where (*k*) the defendant seduced an apprentice from on board the plaintiff's ship in Jamaica, and employed him as a mariner to assist in navigating his own ship home, the plaintiff brought an action for the wages earned by his apprentice, and recovered.

Lightly v. *Clouston.*

And payment to the master has been held to be an answer to an action by the apprentice for wages (*l*). And where (*m*) the captain of a ship let the ship to government at forty shillings per ton per month, to be paid to the *owner*, and an additional

Payment to master, good; and servant cannot recover them from him.

(*e*) Litt. ss. 177, 194; Co. Litt. 123 *b*; and see the form of enfranchisement of a villein given in Barr. on Stat. 279.

(*f*) See *Shanley* v. *Hervey*, cited in *Sommersett's case*, 20 How. St. Tr. 55.

(*g*) See *R.* v. *Wantage*, 1 East, 601; *R.* v. *Bradford*, 1 M. & S. 151.

(*h*) See *Carsan* v. *Watts*, 3 Doug. 350, where the master was held not entitled to prize money, the usage being for the apprentice to have it. *Hill* v. *Allen*, 1 Ves. sen. 83.

(*i*) Co. Litt. 117 *a*, note 1; *Barber* v. *Dennis*, 6 Mod. 69; *S. C.* 1 Salk. 68. The case of *Eades* v. *Vandeput*, 5 East, 39, does not appear to be of much authority for the reasons given in *Foster* v. *Stewart*, 3 M. & S. 191.

(*k*) *Lightly* v. *Clouston*, 1 Taunt. 112; and see *Foster* v. *Stewart*, 3 M. & S. 191; *Neate* v. *Harding*, 6 Exc. 349.

(*l*) *Bright* v. *Lucas*, Peake's Add. Cases, 121. See the note at the end of this case.

(*m*) *Thompson* v. *Havelock*, 1 Camp. 527; see *Diplock* v. *Blackburn*, 3 Camp. 43.

shilling per ton per month, to be paid to himself, for his services, but the whole earnings (including the shilling per ton) were paid to the *owner*, it was held that the captain could not maintain an action against the owner to recover the shilling per ton agreed to be paid to the captain.

This action lies after death of tortfeazor; but admits of set-off.

One advantage attending this form of action formerly was, that it might be brought after the death of the tortfeazor, which was not the case with an action framed on the tort (*n*); but, on the other hand, there was, and still is, this objection to it, that it admits of a set-off and deductions, which would not be allowed in the other form of action (*o*). That, accordingly, is the more usual remedy; and, as we have seen, it may now be brought against the executors of the tortfeazor within six months after his death (*p*). The jury may, in this form of action, if the circumstances justify their so doing, give the plaintiff greater damages than the mere wages of the servant would amount to.

Bloxam v. *Elsee*. Inventions by servant belong to him.

Aliter, if employed on purpose to invent.

It appears to be an exception to the rule, that a master is entitled to the profits resulting from his servant's labour,—that if a servant make an invention whilst in the employ of a master, the invention belongs to the servant, and the master cannot take out a patent for it. Though it is said to be otherwise where the servant is employed for the express purpose of inventing (*q*). That was the case as to Whitehouse's patent (*r*). There an individual was employed for the express purpose of suggesting improvements, and trying experiments of all kinds. The master so admitted before the Privy Council, when he applied for an extension of the patent, and the Privy Council, before they granted the extension, compelled the master to give his servant a large remuneration (*s*). And if a person has discovered an improved principle, and employs engineers, or agents, or other persons to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his

Suggestions of servants may be embodied in master's patent.

(*n*) *Per* Bayley, J., in *Foster* v. *Stewart*, 3 M. & S. 191.

(*o*) *Per* Heath, J., in *Lightly* v. *Clouston*, 1 Taunt. 112.

(*p*) 3 & 4 Will. 4, c. 42, s. 2, *ante*, p. 89. See *Powell* v. *Rees*, 7 A. & E. 426.

(*q*) *Bloxam* v. *Elsee*, 1 C. & P. 558. In that case Bayley, J., founded his observations on a previous case of one Arkwright, referred to in *Hill* v. *Thompson*, 8 Taunt. 395; though in Arkwright's case the invention appears to have been made by the servant *before* the service commenced; in which case it would undoubtedly belong to the servant. But see the Report in Davies' Patent Cases, 61; and see *Makepeace* v. *Jackson*, 4 Taunt. 770, where it was held that a calico-printer, having discharged his head colorman, was entitled to the book in which that servant had entered the processes for mixing colors during his service, although many of the processes were the invention of the servant. That, however, was only an action of trover for *the book* which the master had originally provided.

(*r*) 1 Webster's P. C. 473.

(*s*) *Per* Cresswell, J., in *Allen* v. *Rawson*, 1 C. B. 570.

patent, and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle (*t*). It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent, incorporating them, taken out by his employer. Each case must depend upon its own merits. But when we see that the principle and object of the invention are complete without it, I think it is too much that a suggestion of a workman employed in the course of the experiments of something calculated more easily to carry into effect the conceptions of the inventor should render the whole patent void (*u*).

Patent granted in trust for both master and servant.

In a case in which a manufacturer of tubes, at Birmingham, and his foreman (who had a salary of 300*l.* a year) had together invented certain improvements, for which the master sought letters patent, the granting of which was opposed by the foreman, it was held by Lord Cranworth, L. C., that the letters patent ought only to be granted on the terms of their being vested in trustees for the benefit of *both* master and foreman (*x*). In that case, it appeared almost impossible to say which was entitled to the credit of the improvement in question.

"Stock author" sent to Paris to adapt farce, is "author" within Dramatic Copyright Act.

However, it has been held that a "Stock Author," sent to Paris by the proprietor of an English theatre, for the express purpose of adapting a piece there in vogue for representation on the English stage, is the "author" of the piece, when so adapted, within the meaning of the Dramatic Copyright Act, 3 & 4 Will. 4, c. 15, which vests in the author of any dramatic piece the sole liberty of representing it at any place of dramatic entertainment.

Shepherd v. *Conquest.*

This was decided in the following case (*y*): The plaintiffs, who were the proprietors of the Surrey Theatre, agreed by word of mouth with C., who was what is called a "Stock Author," that he should go to Paris, for the purpose of adapting a piece there in vogue for representation on the English stage; that the plaintiffs should pay his expenses, and should have the sole right of representing the piece in London. C. retaining the right of representation in the provinces. C. went to Paris, produced a farce, and was paid by the plaintiffs as agreed. The farce was brought out at the Surrey Theatre by the plaintiffs, and afterwards at the Grecian Saloon by the defendant, who has obtained an assignment from C. The plaintiffs brought an action against the defendant for penalties, under the Dramatic Copyright Act (*z*). But it was held that the arrangement between them and C. did not make them the *authors* of the farce within the meaning of that act, although it was contended on their behalf that, under the circumstances, C. ought to be considered as merely their servant, the produce of whose labour became the property of his masters at the moment of production,

(*t*) *Per* Erle, J., 1 C. B. 567.

(*u*) *Per* Tindal, C. J., 1 C. B. 574.

(*x*) *Re Russell's Patent*, 2 De G. & Jones, 130.

(*y*) *Shepherd* v. *Conquest*, 17 C. B. 427.

(*z*) 3 & 4 Will. 4, c. 15.

so that no assignment was necessary to vest the property in the latter; and the case was likened to those relating to patent inventions, in which suggestions of servants employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by his employer, and incorporated into his design, without detracting from the originality necessary to sustain a patent for the entire. And it was also contended that the productions of an author are to be dealt with in the same manner as the inventions of a workman, and that the former, like the latter, may become the property of an employer who hires the author's labour, and, as it was said, "buys his brains." To that it was answered that literary productions stand upon different and higher ground from that occupied by mechanical inventions; and that whilst both literary property and patents for inventions are both the creatures of statutes, the enactments respecting them differ widely in their origin and details, and Jervis, C. J., said, "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms, to say that, in such a case, the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it. We cannot bring our minds to any other conclusion than that C., the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and so far as that adaptation gives any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs have no assignment, in writing, of that right, they cannot sue for an infringement of it."

5 & 6 Vict. c. 45.

Copyright in periodicals, reviews, &c., composed in parts by various persons,

By 5 & 6 Vict. c. 45, s. 18, it is enacted, that when any publisher, or other person, shall "project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books, or parts, or any book whatsoever, and shall have employed, or shall employ, any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been, or shall hereafter be, composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such

in proprietor (not author).

proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act, except only that in case of essays, articles, or portions forming part of, and first published in, reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately, or singly, without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed, as aforesaid, to publish any such his composition in a separate form, who by any contract expressed or implied may have reserved, or may hereafter reserve to himself such right, but every author reserving, retaining, or having such right, shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Proviso for authors who have preserved the right of publishing their articles in a separate form.

Accordingly it has been held (*a*) that the proprietor of a periodical who employs a gentleman to write a given article or series of articles, or reports expressly for the purpose of publication therein, acquires the copyright in such article, and may maintain an action for piracy thereof.

Sweet v. *Benning.*

In the following case (*b*) it was held that a composer of music could not sue the person who employed him to compose it as part of a dramatic piece, for performing it without his consent in writing, contrary to the Dramatic Copyright Act, 3 & 4 Will. 4, c. 15, and the General Copyright Act, 5 & 6 Vict. c. 45.

Composer of music employed by manager of a theatre.

Hatton v. *Kean.*

The plaintiff, a composer of music, was employed by the defendant, who was manager of a theatre, to compose, and did compose, a certain musical composition for the purpose of being performed at, during and as part of a representation of Shakspeare's play "Much Ado about Nothing," and alleged, in his declaration, that he had the sole liberty and right of performing the said composition; and that defendant, without his consent in writing, caused it to be performed and represented at the defendant's theatre contrary to the Dramatic Copyright Act and the General Copyright Act. The defendant pleaded that the musical composition was part of a dramatic piece adapted to the stage by the defendant, with the aid of scenery, dresses, the alleged composition, and other music and accompaniments; the general design of which representation was formed by the defendant, who employed the plaintiff for reward paid to him, to compose the said musical composition, as part of the said re-

(*a*) *Sweet* v. *Benning*, 16 C. B. 459; see also *Stevens* v. *Benning*, 24 L. J., Ch. 153.

(*b*) *Hatton* v. *Kean*, 29 L. J., C. P. 20; *S. C.* Law Times, 1 N. S. 10.

presentation and dramatic piece, on the terms that the said musical composition should become part of such dramatic piece, and that the defendant should have the sole liberty of representing and performing the said musical composition with the said dramatic piece, and as part thereof; and that the said musical composition was composed by the plaintiff under the said employment, and on the terms, &c., aforesaid. It was held on demurrer that the plea was a good answer to the action; and Erle, C. J., said, "I found my opinion entirely on the facts stated in the plea, and because no decision has yet been given on such circumstances as those subsisting between these parties. Looking at all the facts as disclosed in the pleadings, it seems to me that the defendant was substantially the author and designer of this dramatic piece. The capital and skill he employed in producing it and bringing it out were considerable, while the plaintiff's duty was small and confined to one subordinate department. The music he furnished was, as it seems to me, composed under the employment, and by direction of, the defendant; was paid for by him, and became his property, and therefore he violated no contract by using it. The very terms of the engagement lead me to this judgment; were it otherwise, a single successful production might induce the plaintiff to withdraw his music, to the great detriment of the defendant;" and Byles, J., added. "This falls within the class of cases in which the Court, in *Shepherd* v. *Conquest*, abstained from expressing any opinion."

OF THE ACTION BY A MASTER FOR PERSONAL INJURIES TO HIS SERVANT.

Numerous instances are to be found in the books of actions by masters, for personal injuries to their servants; whether caused by an assault (*c*) or by battery (*d*), or by negligent driving (*e*), or by a ferocious dog (*f*); and in one case a man recovered damages in an action against a person for negligently entrusting a loaded gun to a mulatto girl, who discharged it against the plaintiff's son and servant (*g*). This action also depends on the loss of service (*h*), but a service *de facto* is sufficient to support the action (*i*). It is in this form of action that a parent usually proceeds to recover damages for injuries sustained by his children through the wrongful acts of the defendant, for in such cases a parent cannot recover any damages for his wounded feelings, but only for the loss of ser-

Loss of service.

(*c*) *Gilbert* v. *Schwenck*, 14 M. & W. 488.

(*d*) *Duel* v. *Harding*, Str. 595.

(*e*) *Hall* v. *Hollander*, 4 B. & C. 660; *Martinez* v. *Gerber*, 3 M. & G. 88; *Gough* v. *Bryan*, 2 M. & W. 770.

(*f*) *Hodsoll* v. *Stallebrass*, 11 A. & E. 301; *Lewis* v. *Fog*, Str. 944.

(*g*) *Dixon* v. *Bell*, 1 Stark. 287; *S. C.* 5 M. & S. 198.

(*h*) *Robert Mary's Case*, 9 Rep. 113 *b*; and cas. cit. *ante*, p. 86, note (*a*); *Rosiere* v. *Sawkins*, Holt, 460.

(*i*) 11 Hen. 4, 2, F. N. B. 91, G., note; see *Martinez* v. *Gerber*, 3 M. & G. 88.

vice he has sustained (*k*). Where, therefore (*l*), the defendant drove his carriage against the plaintiff's son, who was an infant only two years and a-half old, and the plaintiff brought an action of trespass, *per quod servitium amisit*, against the defendant; upon its being objected that the child was not competent to perform any act of service by reason of its tender age, the plaintiff was nonsuited, and the nonsuit was afterwards held right by the Court; Bayley, J., observing, "The authorities upon this point are all one way." If, however, there is a capacity to serve, very slight evidence is sufficient to support the allegation of service (*m*); and, indeed, in modern cases, where there has been a capacity to serve, the tendency of the Courts has been to infer service from residence with the parent, without proof of actual service (*n*). Where the child injured is of such tender age as to render it doubtful whether service could be presumed, the best way to avoid the difficulty is to sue in the name of the child; a course against which the objection which formerly prevailed (*o*) — viz., that the adoption of it excluded the child's testimony, would not now apply (*p*).

Hall v. *Hollander*.

Incapacity to serve.

Capacity to serve.

Action by servant.

The form of action may be either trespass or case, according as the plaintiff wishes to recover damages for the direct or consequential injury (*q*). In trespass, counts may be added for breaking and entering the plaintiff's dwelling-house and assaulting himself, which might increase the damages (*r*). Whereas in an action for the assault on the child merely, however atrocious it might be, the plaintiff could recover nothing unless loss of service were shown (*s*). It is no objection to an action on the case by the master, that, under the circumstances, had the servant himself sued, he could only have sued in case for the consequential damage done to him (*t*). Nor is it any answer to such an action that the servant himself has already recovered damages for the injury he has sustained; for the injury to the servant and that to the master are collateral, not consequent upon each other (*u*). If the servant die, the master

Form of action.

Recovery by servant no answer to action by master.

Death of servant.

(*k*) *Flemington* v. *Smithers*, 2 C. & P. 292. Mark the difference in this respect between this action and that for seduction, *post*, p. 98. Formerly, whilst it was petit treason for a servant to kill his master (25 Ed. 3, st. 5, c. 2; see now 9 Geo. 4, c. 31, s. 2), parricide was held not to be petit treason unless the child *served* the father or mother for wages, or meat, drink, or apparel; 3 Inst. 20.

(*l*) *Hall* v. *Hollander*, 4 B. & C. 660.

(*m*) In *Dixon* v. *Bell*, 1 Stark. 287; *S. C.* 5 M. & S. 198, the plaintiff recovered for an injury to his son, eight or nine years old, without proof of actual service.

(*n*) See *Jones* v. *Brown*, Peake, 233; *S. C.* 1 Esp. 217; *Maunder* v. *Venn*, M. & M. 323; *Torrence* v. *Gibbins*, 5 Q. B. 300.

(*o*) *Duel* v. *Harding*, Str. 595; *Lewis* v. *Fog*, *ib.* 944; *Cock* v. *Wortham*, *ib.* 1054; Selw. N. P. 1114.

(*p*) 14 & 15 Vict. c. 99, s. 2.

(*q*) *Chamberlain* v. *Hazlewood*, 5 M. & W. 515.

(*r*) *Ditcham* v. *Bond*, 2 M. & S. 436.

(*s*) *Newton* v. *Holford*, 6 Q. B. 927.

(*t*) *Martinez* v. *Gerber*, 3 M. & G. 88.

(*u*) *Savil* v. *Kirby*, 10 Mod. 386; *Edmondson* v. *Machell*, 2 T. R. 4.

must proceed first by indictment, as public policy will not allow him to recover damages for a private injury, until public justice is satisfied by the trial of the offender. After trial, the master may still bring his action, whether the offender be convicted or acquitted, as the private right is only suspended until public justice is vindicated (*x*).

Damages.

In this action, the master may recover damages for the loss of service, not only before action brought, but afterwards, down to the time when it appears by the evidence the disability to serve may be expected to cease (*y*); and he may also recover the amount of the surgeon's bill, although it has not been paid, but not physician's fees, if not paid (*z*).

Defence.

The defendant may plead that the party injured was not the plaintiff's servant (*a*). It seems, however, unnecessary, though perhaps safer, to do so (*b*). He may also pay money into court, provided the assault complained of be not of the plaintiff himself. If there be a count in the declaration for an assault on the plaintiff himself, the payment into court should be confined to the other counts (*c*).

OF THE ACTION FOR SEDUCTION.

This action also depends upon the existence of the relationship of master and servant between the party bringing the action and the party seduced (*d*), although it is the only method in which a parent, however high in rank he may be, can recover damages against the seducer of his daughter. In one respect this action is similar to that lastly treated of, viz., that as it is the invasion of the legal right of a master to the services of his servant, that gives him a right of action for assaults, &c., committed upon his servant, so it is the invasion of the same legal right, and no other, which gives a father a right of action against the seducer of his daughter (*e*). But there is this important practical difference between the two actions, that in the action for assaulting, &c., a servant or child, the plaintiff cannot recover any compensation for the injury his feelings may have sustained; whilst in the action for seduction he may do so (*f*).

Loss of service.

(*x*) *Crosby* v. *Leng*, 12 East, 409; see *Stone* v. *Marsh*, 6 B. & C. 551; *White* v. *Spettigue*, 13 M. & W. 608.

(*y*) *Hodsoll* v. *Stallebrass*, 9 C. & P. 63; *S. C.* 11 A. & E. 301.

(*z*) *Dixon* v. *Bell*, 1 Stark. 287.

(*a*) *Torrence* v. *Gibbins*, 5 Q. B. 297.

(*b*) *Holloway* v. *Abell*, 7 C. & P. 530; *Eager* v. *Grimwood*, 1 Exc. 61; but see *Davies* v. *Williams*, 10 Q. B. 725.

(*c*) *Newton* v. *Holford*, 6 Q. B. 921; *S. C.* 2 D. & L. 554.

(*d*) *Grinnell* v. *Wells*, 7 M. & G. 1033; *S. C.* 2 D. & L. 610; *Eager* v. *Grimwood*, 1 Exc. 61; see *Fores* v. *Wilson*, Peake, 55.

(*e*) *Per* Tindal, C. J., in *Grinnell* v. *Wells*, *ubi supra*. It is the same in America, *Bartley* v. *Richtmyer*, 4 Comst. 38; *Dain* v. *Wycoff*, 3 Seld. Rep. 191.

(*f*) In *Dodd* v. *Norris*, 3 Camp. 520, Lord Ellenborough expressed an opinion that it was necessary to watch that this anomaly should not be carried further, and that the original scope of the action should not be entirely lost sight of.

Damages for injury to feelings.

And this, in practice, is the chief object of the action for seduction, in which liberal damages are usually given, and the courts are disinclined to grant new trials merely on the ground of excess in that respect (*g*). The custom of allowing the jury, in ascertaining the amount of damages in this action, to have regard not merely to the injury sustained by the loss of service, but also to the wounded feelings of the plaintiff, has arisen from a laudable desire to suppress the vice of seduction, against which the criminal law has not provided any punishment; though it may be fairly doubted how far it has succeeded in accomplishing the desired object (*h*). The custom, however, has been now so long established, that it can only be altered by the legislature.

Scienter.

There is also this distinction to be observed between this action for seduction and that for enticing away and harbouring apprentices or servants (the gist of which also, as we have seen, is the loss of service), that in the former it is not necessary to prove that the defendant *knew* the person seduced to be the plaintiff's servant, whilst in the latter it is necessary to do so (*i*).

By whom this action may be brought.

The gist of this action being loss of service, it follows that it may be brought by any one who has sustained that loss, whether he be merely the master and not a relative (*k*), or the parent, brother (*l*), or aunt (*m*) of the person seduced. And, in one instance, a person who had adopted a friend's daughter was allowed to bring an action for her seduction (*n*). But the right of action for an injury of this sort does not pass to the assignees of a master who has become bankrupt, as they have no right to make a profit of a man's wounded feelings (*o*).

It is no objection to this action by the master, that the party seduced was of age at the time of the seduction (*p*), nor that she was a married woman if living with her father, and acting as his servant, for it is not competent to a wrongdoer to

(*g*) *Tullidge* v. *Wade*, 3 Wils. 18; *Edmondson* v. *Machell*, 2 T. R. 4; *Bennett* v. *Alcott*, 2 T. R. 166; and see *Duberley* v. *Gunning*, 4 T. R. 651; *Elliott* v. *Nicklin*, 5 Price, 641.

(*h*) Selw. N. P. 1115; *Southernwood* v. *Ramsden*, H. T. 1805; *Chambers* v. *Irwin*, *ib. cit.*; *Irwin* v. *Dearman*, 11 East, 23; and see *per* Tindal, C. J., in *Grinnell* v. *Wells*, 7 M. & G. 1043.

(*i*) *Per* Lord Kenyon, in *Fores* v. *Wilson*, Peake, 55; and see *Winsmore* v. *Greenbank*, Willes, 577.

(*k*) *Fores* v. *Wilson*, *ubi supra*.

(*l*) *Howard* v. *Crowther*, 8 M. & W. 601.

(*m*) *Edmondson* v. *Machell*, 2 T. R. 4.

(*n*) *Irwin* v. *Dearman*, 11 East, 23. The American courts go further than the English in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure. See *Bartley* v. *Richtmyer*, 4 Comst. 38 (1850); *Mulvehall* v. *Millward*, 1 Kernan's Rep. 343 (1854).

(*o*) *Howard* v. *Crowther*, 8 M. & W. 601; and see *Beckham* v. *Drake*, 2 Ho. Lords Cas. 579.

(*p*) *Bennett* v. *Alcott*, 2 T. R. 166; *Tullidge* v. *Wade*, 3 Wils. 18.

set up the rights of the husband as an answer to the action if he do not interfere (*q*).

Form of action.

The action may be brought either in trespass or case (*r*). If the former is brought, as it more usually is when actual violence has been used, the plaintiff may also recover damages for any trespass committed in breaking and entering his house, and assaulting himself (*s*). If the latter form of action is adopted, the trespass is waived, and the plaintiff can only recover for the consequential damage. But whatever the form of action, the allegation *per quod servitium amisit* is indispensable (*t*); to sustain which it is necessary that the party seduced should be in the actual service of the plaintiff at the time of the seduction (*u*). Where, therefore, the plaintiff's daughter was apprenticed to the defendant's wife, for the purpose of learning the business of a milliner, and the defendant seduced her, it was held that the plaintiff could not maintain an action against him for the seduction (*x*). So a father cannot maintain an action for the seduction of a daughter who is, at the time of the seduction, in the actual domestic service of another, although she intend to return to her father's house at the end of her term of service (*y*). A mere temporary absence, however, from her father's house, as if on a visit to a friend, if not in the actual service of another, would not defeat the action (*z*). Therefore, where the plaintiff's daughter *lived with* her brother, but went every day to her father's house to do all the household business as when she resided with him, and he kept no other servant; it was held that he might maintain an action for his daughter's seduction (*a*). And where the defendant hired the plaintiff's daughter as his servant, with a view to obtain possession of her person in order to seduce her, it was held that such a hiring would not defeat an action brought by her father, as it was merely a colorable hiring (*b*).

Loss of service.

Father cannot sue for seduction of his daughter who is apprentice;

or servant of another person.

Temporary absence from home.

Colorable hiring.

Again, if a girl be seduced whilst out in service, and return to her father's house in a state of pregnancy, and he support

Nor can father sue where his

(*q*) *Harper* v. *Luffkin*, 7 B. & C. 387.

(*r*) *Chamberlain* v. *Hazlewood*, 5 M. & W. 515; *S. C.* 7 Dowl. 816.

(*s*) *Ditcham* v. *Bond*, 2 M. & S. 436.

(*t*) See *Grinnell* v. *Wells*, 7 M. & G. 1033; *S. C.* 2 D. & L. 610, where judgment was arrested for want of it.

(*u*) But a binding contract of service is not necessary, *Harper* v. *Luffkin*, 7 B. & C. 387.

(*x*) *Harris* v. *Butler*, 2 M. & W. 539; *Thompson* v. *Ross*, Exc. M. T. 1859; Law Times, 1 N. S. 43. But see *Speight* v. *Oliveira*, 2 Stark. 493, *infra*, note (*b*), and the American cases of *Bartley* v. *Richtmyer*, 4 Comst. 38; *Dain* v. *Wycoff*, 3 Seld. 191.

(*y*) *Dean* v. *Peel*, 5 East, 46; *Blaymire* v. *Haley*, 6 M. & W. 55.

(*z*) *Per* Parke, B., in *Blaymire* v. *Haley*, *ubi supra*.

(*a*) *Mann* v. *Barrett*, 6 Esp. 32.

(*b*) *Speight* v. *Oliveira*, 2 Stark. 493; *Griffiths* v. *Teetgen*, 15 C. B. 344; *S. C.* 24 L. J., C. P. 35. See *R.* v. *Delaval*, 3 Burr. 1434, where a criminal information was granted for fraudulently assigning a female apprentice for the purpose of prostitution. And see the American cases, *supra*, note (*x*).

her during and after her confinement, he cannot maintain any action for the seduction, as *he* did not *thereby* lose her services, she being in the service of another (*c*). And so, if the jury find that the child of which the plaintiff's daughter was delivered was not the defendant's, although he was proved to have had connexion with her, the plaintiff can sustain no action against the defendant, as he has sustained no loss of service by *the defendant's* act (*d*). And it has been questioned whether a parent can maintain this action where the loss of service arose from distress of mind consequent upon abandonment after seduction, it being conceived that the damage was too remote (*e*).

daughter confined at his house, if seduced whilst in service.

Child not defendant's.

Abandonment after seduction.

Where this action is brought by a parent for the seduction of a daughter who resides with him, evidence of very slight acts of service (*f*), such as milking cows (*g*), making tea (*h*), and the like, has been held sufficient to prove the allegation of loss of service. Nay, the courts are disposed to *infer* service from residence with the parent, where there is a capacity to serve (*i*). Whether or not the same inference could be drawn in the case of one standing *in loco parentis* is not settled.

Loss of service of daughter residing with parent.

The action for seduction cannot be brought in the county court (*k*). It would seem, however, that a defendant might be held to bail if about to quit England (*l*).

The daughter or servant may be a witness (*m*), but the plaintiff is not bound to call her (*n*). The omission to do so, however, would afford ground for such strong observations on the part of the defendant, that, in practice, it is usual to call her. She can, however, only be asked as to circumstances occurring before and *immediately after* her connexion with the defendant, to show that it was against her consent (*o*). And she is not bound to answer, on cross-examination, whether before her acquaintance with the defendant she had not been criminal with other men (*p*). And where she has been cross-examined at length as to circumstances of extreme indelicacy and great levity of conduct in

Evidence.

Cross-examination.

(*c*) *Davies* v. *Williams*, 10 Q. B. 725. In *Joseph* v. *Cavander*, Winton Summ. Ass. 1834 (cited in Rosc. on Ev. 467), the action was held to lie, though the daughter had not actually been confined before action brought, and the plaintiff had voluntarily turned her out of his house upon discovering her pregnancy.

(*d*) *Eager* v. *Grimwood*, 1 Exc. 61.

(*e*) *Boyle* v. *Brandon*, 13 M. & W. 738.

(*f*) *Mansell* v. *Thomson*, 2 C. & P. 303; *Holloway* v. *Abell*, 7 C. & P. 528.

(*g*) *Bennett* v. *Alcott*, 2 T. R. 168.

(*h*) *Carr* v. *Clarke*, 2 Ch. Rep. 260.

(*i*) *Maunder* v. *Venn*, M. & M. 323; *Torrence* v. *Gibbins*, 5 Q. B. 300; see *Jones* v. *Brown*, Peake, 233; *S. C.* 1 Esp. 217; and *per* Lord Wensleydale, in *Harris* v. *Butler*, 2 M. & W. 539.

(*k*) 9 & 10 Vict. c. 95, s. 58.

(*l*) See *Bullock* v. *Jenkins*, 1 L. M. & P. 645. That, however, was an action for *crim. con.*

(*m*) *Cock* v. *Wortham*, 2 Str. 1054; *S. C.* Selw. N. P. 1114; and see *Tullidge* v. *Wade*, 3 Wils. 18.

(*n*) *Farmer* v. *Joseph*, Holt, 451.

(*o*) *Colyer* v. *Mayne*, 2 Carr. & K. 1011.

(*p*) *Dodd* v. *Norris*, 3 Camp. 519.

submitting to the defendant's embraces, those circumstances must be explained, if capable of explanation, on re-examination, for the plaintiff cannot, in answer, call witnesses to her general character (*q*). Though, in one case, where the cross-examination went to show that the plaintiff's daughter had conducted herself immodestly towards the defendant before her seduction, and that she kept improper company, witnesses were allowed to be called, on the part of the plaintiff, to prove the general good character and modest deportment of the daughter, and the general respectability of the family (*r*). The plaintiff cannot give evidence of the *general* good character of the person seduced, except in answer to evidence of *general* bad character. And, therefore, where evidence is given of a specific breach of chastity, the plaintiff is restricted to disproving that specific act (*s*). Nor can evidence be admitted on the part of the plaintiff to show that the defendant accomplished the seduction by means of a promise of marriage (*t*); at least not *directly* for the purpose of increasing damages, though such evidence may be given *indirectly*, and is frequently received for the purpose of vindicating the girl's character (*u*). Declarations of the defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, have been admitted in evidence in aggravation of damages (*x*).

Evidence of general good character.

Promise of marriage.

Defence.

The defendant may plead that the person seduced was not the plaintiff's servant (*y*), though it appears unnecessary to do so (*z*). It is, however, safer to add such a plea if it is intended to rely on that fact as a defence to the action. But the defendant cannot pay money into court (*a*).

Evidence.

On the part of the defendant evidence may be given, in mitigation of damages, not only of the general bad character of the person alleged to have been seduced, but also of particular acts of unchastity on her part (*b*). But he cannot call witnesses to prove that she has talked of another person than the defendant

(*q*) *Dodd* v. *Norris, ubi supra;* and see *Bamfield* v. *Massey*, 1 Camp. 460.

(*r*) *Bate* v. *Hill*, 1 C. & P. 100. See the note at the end of the case, where it is said that the course adopted in that case is more conducive to the ends of justice, than that adopted in *Dodd* v. *Norris*. And see 1 Ph. on Ev. 468.

(*s*) *Bamfield* v. *Massey*, 1 Camp. 460.

(*t*) *Dodd* v. *Norris*, 3 Camp. 519.

(*u*) *Per* Garrow, B. (in *Elliott* v. *Nicklin*, 5 Price, 647), who was counsel in *Dodd* v. *Norris*. And see *Tullidge* v. *Wade*, 3 Wils. 18; *Capron* v. *Balmond*, Exeter Spr. Ass. 1831; Rosc. on Ev. 468.

(*x*) *Knowles* v. *Compigne*, Wint. Summ. Ass. 1835; Rosc. on Ev. 44.

(*y*) *Torrence* v. *Gibbins*, 5 Q. B. 297; *Davies* v. *Williams*, 10 Q. B. 725.

(*z*) *Holloway* v. *Abell*, 7 C. & P. 530; *Eager* v. *Grimwood*, 1 Exc. 61.

(*a*) 3 & 4 Will. 4, c. 42, s. 21; 15 & 16 Vict. c. 76, s. 70.

(*b*) *Verry* v. *Watkins*, 7 C. & P. 308; and see *R.* v. *Martin*, 6 C. & P. 562; *R.* v. *Robins*, 2 M. & Rob. 512. But see *per* Erle, J., 16 Q. B. 178, who said he knew no instance of evidence of general bad character being admitted in actions for seduction.

as her seducer and the father of her child, unless she be first asked in cross-examination whether she ever used those expressions (*c*). Such evidence, however, might be admissible to show general misconduct and frequent use of loose language (*d*).

The plaintiff may recover damages for the injury which his feelings have sustained in addition to the actual expense incurred by loss of service and payment of doctor's bills (*e*). And, in one case, Lord Eldon told the jury that, in estimating the damage sustained by the plaintiff, they might look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she could feel no consolation; and as the parent of other children whose morals might be corrupted by her example (*f*). But it would seem to be the better opinion that the plaintiff cannot aggravate the damages by proof of the wealth of the defendant (*g*). Damages.

(*c*) *Carpenter* v. *Wall*, 11 A. & E. 803. In *Andrews* v. *Askey*, 8 C. P. 7, Tindal, C. J., allowed her to be recalled and re-examined on this point.

(*d*) *Carpenter* v. *Wall*, *ubi supra*.

(*e*) *Andrews* v. *Askey*, 8 C. P. 7; *Chambers* v. *Irwin*, *Southernwood* v. *Ramsden*, Selw. N. P. 1127 (12th ed.). As to doctor's bills, see *Dixon* v. *Bell*, 1 Stark. 287.

(*f*) *Bedford* v. *M'Kowl*, 3 Esp. 119.

(*g*) *Jones* v. *Beddington*, 6 C. & P. 589; see also *Dain* v. *Wycoff*, 3 Seld. Rep. 191.

CHAPTER IV.

THE DUTIES OF THE MASTER TO THE SERVANT, AND THE RIGHTS AND REMEDIES OF THE SERVANT TO ENFORCE THE PERFORMANCE OF THEM.

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OF THE MASTER'S DUTY TO RECEIVE THE SERVANT INTO HIS SERVICE, AND RETAIN HIM; AND THE SERVANT'S REMEDIES FOR BREACH OF SUCH DUTIES.

Duty of master to receive servant into his service.

Action for refusal.

Clarke v. *Allatt.*

It is obviously the duty of every man who has engaged another person as a servant, to receive such person into his service, and if he refuse to do so without any good reason for his refusal, such person may maintain an action against him for that breach of contract (*a*). Thus, where the defendant agreed to take the plaintiff, who was a shepherd, into his service at certain wages for the then next lambing season, for five weeks next ensuing after the 28th February then next, but afterwards refused to allow him to enter into his service, the plaintiff recovered damages in an action brought for such breach of contract on the part of the defendant (*b*). To sustain this action, however, it would (*c*)

(*a*) *Bracegirdle* v. *Heald*, 1 B. & Ald. 722, *ante*, p. 22; *Blogg* v. *Kent*, 6 Bing. 614. Where there is only one copy of the contract of hiring, the court will compel the party in whose possession it is to produce it to the other party, *ib.*

(*b*) *Clarke* v. *Allatt*, 4 C. B. 335.

(*c*) *Bracegirdle* v. *Heald*, *ubi supra*. As to the requisites of the contract, see *ante*, Chap. II.

of course be necessary to prove a legally-binding contract of hiring and service. It is obvious that what would be a good reason for *discharging* a servant would be an equally good reason for refusing to receive him into one's service, after having engaged to do so. But it is no answer to an action for not performing an agreement to employ the plaintiff, that he has entered into a conspiracy to depart from the agreement, unless the conspiracy has been acted on (*d*).

Conspiracy to depart from agreement, no answer, unless acted on.

And where a person has entered into a binding agreement to take another into his service on a future day, but before that day arrives, announces his intention not to do so, he is entitled to be believed, and the servant may thereupon *immediately* bring an action against him, and is not bound to wait till the day arrives to see if the master will change his mind. In a case (*e*), therefore, in which a gentleman in April engaged a courier to accompany him on a tour for three months on the continent of Europe, to commence on the 1st of June, but in May wrote to say he had changed his mind, and declined the courier's services, and the courier thereupon in May commenced an action against him, and afterwards, before the 1st of June, obtained another engagement, on equally good terms, but not commencing till 4th of July; it was held that the courier was entitled to recover, although it was objected, and very powerfully contended, that the plaintiff was bound to remain ready and willing to perform the contract till the day when the actual employment was to begin, and that there could be no breach of the contract before the 1st of June. And Lord Campbell, C. J., said: "The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."

Action may be brought before the day for commencement of service.

Hochster v. *De la Tour.*

Damages.

It is conceived, however, that in such case if the servant do not act upon the master's announced renunciation of the contract, and before the day arrives for the commencement of the service, becomes either by the act of God, *vis major*, or his own misconduct or misfortune, incompetent or unable to perform his part of it, the master would be at liberty to avail himself of

If not brought and servant incapacitated master may rescind.

(*d*) *Hemingway* v. *Hamilton*, 4 M. & W. 115. See the pleadings in *Mercer* v. *Whall*, 5 Q. B. 447.

(*e*) *Hochster* v. *De la Tour*, 2 E. & B. 678; *Avery* v. *Bowden*, 5 E. & B. 728.

those circumstances to rescind the contract, and could not afterwards be sued for a breach of it (*f*).

Duty of master to retain servant.

It is also the duty of a master to retain the servant during the whole time that he has contracted to do so; and if he dismiss the servant before the expiration of that period without lawful cause (*g*), the servant may maintain an action against him for such wrongful dismissal.

Court of Chancery will not grant injunction to compel master to retain servant.

Stocker v. *Brockelbank.*

Where a servant is dismissed by his master during the period of service agreed upon, for alleged misconduct or other cause, the Court of Chancery will not interfere by injunction (*h*) to restrain the master from so doing, but will leave the servant to his action at law. In a case (*i*), therefore, in which Lord Cranworth, V. C., granted an injunction to restrain a lucifer match manufacturer from discharging his manager, who was appointed under a written agreement, Lord Truro, L. C., on appeal, dismissed the order, saying, "He did not recollect any instance of any attempt on the part of a court of equity to compel the employer to retain the servant, agent or manager, and not to forbear to leave him to his remedy at law. Consider," added his lordship, "what the effect would be: how is it possible for an employer or an agent to go on in the intimate connexion which such a contract is calculated to create? They are to be on the same premises, acting in the management of the same business, in this case, and if there is mutual dissatisfaction, well or ill-founded, it is perfectly clear that a management conducted under such circumstances, must tend very much to the prejudice of the concern—in this case, I think, particularly."

Johnson v. *Shrewsbury, &c. Railway Company.*

Similar reasons were given by Lord Justice Knight Bruce, in refusing an injunction to restrain a railway company from discharging a contractor (*j*).

The nature of the service to be rendered in that case may (without entering into particulars) be described in the words of the first half of the fifth section of the contract, viz., "that the said contractors will from time to time at all times during the term of this contract, run and work all the trains of the railway company, and provide, for the purposes of this contract, a sufficient number of efficient foremen, mechanics, engine-drivers, firemen, cleaners, storekeepers and other persons, and the requisite coke and firewood,

(*f*) See *Avery* v. *Bowden*, 5 E. & B. 714; 6 E. & B. 953; *Reid* v. *Hoskins*, 5 E. & B. 729; 6 E. & B. 953; see also *Barwick* v. *Buba*, 26 L. J., C. P. 280; *Crookewit* v. *Fletcher*, 26 L. J., Exc. 153; *Roberts* v. *Brett*, 28 L. J., C. P. 323.

(*g*) See the preceding Chapter as to what causes will justify the dismissal of a servant.

(*h*) Where the master is a *trustee*, however, as in the case of trustees of a school, the Court of Chancery will sometimes, on a fit case being made out, interfere. See *Willis* v. *Child*, 13 Beav. 117; *S. C.* 20 L. J., N. S., Ch. C. 113, where Lord Langdale, M. R., granted an injunction to restrain the trustees of a charity school from discharging the master; and see *Doe* v. *Willis*, 5 Exc. 894.

(*i*) *Stocker* v. *Brockelbank*, 20 L. J., Ch. Cas. 408.

(*j*) *Johnson* v. *The Shrewsbury and Birmingham Railway Company*, 3 De G., M. & G. 914; *S. C.* 17 Jur. 1015.

oil, tallow, &c. and other materials of the best quality." And Knight Bruce, L. J., said, "We are asked to compel one person to employ, against his will, another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done. A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while on the one hand all that the servant requires or wishes (and that reasonably enough) is money, you are on the other hand to destroy the comfort of a man's existence, for a period of years, by compelling him to have constantly about him, in a confidential situation, one to whom he objects. If that be so in private life, how important do these considerations become when connected with the performance of such duties—duties to society—as are incumbent upon the directors of a company like this."

Where contract determinable by notice or payment of wages, and servant discharged wages become a debt from master;

Before proceeding to consider the remedies for a servant *wrongfully* discharged, it may here be observed, that where the contract of hiring is determinable by notice or payment of salary (*e. g.* by a month's notice or payment of a month's salary), and the master discharges the servant at a moment's notice, the servant in such case being discharged rightfully, in accordance with the contract, the amount of salary agreed to be paid in lieu of notice (*e. g.* a month's salary) becomes a *debt* due from the master to the servant, and may be sued for as such, or set off by the servant in any action brought by the master against him to which a set-off can be pleaded. Where, therefore, a clerk to a railway company (*k*), under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or payment of three months' salary, was summarily discharged by the company, who sued him for money had and received to their use, it was held that he was entitled to set off against their claim the amount of three months' salary which became due *co instanti* that he was discharged. Maule, J., saying, "It is clear that where there is an agreement to pay a certain sum in a certain event, an action of debt will lie for the recovery of that sum, which becomes a debt as soon as the event happens; and it is the proper subject of set-off."

and subject of set-off.

May be tried before sheriff.

And an action to recover a smaller sum than 20*l.* upon such a claim, may be tried before the sheriff, under 3 & 4 Will. 4, c. 42, s. 17 (*l*); whilst, as we shall presently see, an action for wrongful discharge being a claim for unliquidated damages, cannot be tried before the sheriff under that statute.

(*k*) *East Anglian Railway Company* v. *Lythgoe*, 2 L. M. & P. 221; *S. C.* 10 C. B. 726.

(*l*) *Hatton* v. *Macready*, 2 D. & L. 5.

REMEDIES FOR SERVANT WRONGFULLY DISCHARGED.

A servant wrongfully discharged has the two following remedies open to him at law, either of which he may pursue immediately on his discharge (*m*):—

Twofold.

1. He may treat the contract of hiring and service *as continuing*, and bring a special action against his master for breaking it by discharging him; and this remedy he may pursue whether his wages are paid up to the period of his discharge or not; or,
2. If his wages are not paid up to the time of his discharge, he may treat the contract of hiring and service as *rescinded*, and sue his master on a *quantum meruit* for the services he has actually rendered (*n*).

Action for wrongful discharge preferable.

The former of these, however, is the remedy more usually adopted, and it is the preferable one, as, in the latter case, the action is founded on an implied contract arising out of *actual* services, and no such contract arises by implication of *law* upon a simple dissolution of a special contract of hiring and service (*o*); and though a jury are at *liberty* to imply such a contract from circumstances (*p*), and probably would in most cases do so, yet they are not *bound* to do so, and could only imply a contract to pay wages for the services *actually rendered*. And, therefore, in the latter form of action, a servant *could* only recover wages up to the time of his discharge. Whilst in the former case the action being founded on a contract, which the law would imply on the part of the master, to indemnify the servant against all such damages as he had sustained by reason of the master's breach of contract in discharging the servant, and not allowing him to perform *his* part of the contract; the servant, if he re-

(*m*) *Pagani* v. *Gandolfi*, 2 C. & P. 370; see 2 Smith's L. C. 20, note to *Cutter* v. *Powell*. It is there stated as the result of the authorities, that a servant wrongfully discharged has his election of *three* remedies, viz., the two spoken of in the text, and also "he may wait till the termination of the period for which he was hired, and may then, *perhaps*, sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service:" in support of which, *Gandell* v. *Pontigny*, 1 Stark. 198; *S. C.* 4 Campb. 375, and *Collins* v. *Price*, 5 Bing. 132, are cited. But it is also added, "*vide tamen*, the observations of the judges in *Smith* v. *Hayward*, 7 A. & E. 544. It is conceived, however, that this third course *cannot* be adopted, and that the cases which appear to support it must now be considered to be overruled. See *Fewings* v. *Tisdal*, 1 Exc. 295; *Elderton* v. *Emmens*, 6 C. B. 160; 13 C. B. 508; *Goodman* v. *Pocock*, 15 Q. B. 576; *Beckham* v. *Drake*, 2 Ho. Lords Cases, 606, where Erle, J., said "When a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment." See *per* Crompton, J., in *Elderton* v. *Emmens*, 13 C. B. 508.

(*n*) *Lilley* v. *Elwin*, 11 Q. B. 755; *Planche* v. *Colburn*, 8 Bing. 14; *Archard* v. *Horner*, 3 C. & P. 349.

(*o*) *Lamburn* v. *Cruden*, 2 M. & G. 253.

(*p*) *Ib.*; and see *Thomas* v. *Williams*, 1 A. & E. 685; and *Planche* v. *Colburn*, 5 C. & P. 61.

covered at all, would recover something *beyond* the amount of wages due at the period of his discharge (*q*).

First of the action for wrongful discharge.

First. Of the action for wrongful dismissal (*r*). The right of a servant, wrongfully discharged, to maintain this action does not depend on the question whether or not his wages are paid up to the period of his discharge. It is utterly irrespective of that. In this action the servant seeks compensation, not for services he has rendered previous to his discharge, but *for the injury he has sustained* by such discharge in not being allowed to serve and earn the wages agreed upon (*s*).

How wages for actual service before discharge to be recovered.

In this form of action, indeed, the plaintiff cannot recover wages *due* (*t*) for the period during which he has actually served. These wages must be recovered on the count for wages, which may be added to the count for wrongful dismissal.

Hartley v. *Harman.*

Therefore, where (*u*) in an action for wrongful dismissal, it appeared that the defendant was chairman of a company by which the plaintiff was retained in the capacity of superintendent of works, "the salary to be at the rate of 150 guineas per annum, either party to have the option of terminating the engagement by giving one month's written notice," and that at the end of eighteen months the plaintiff was dismissed without notice, no wages having been paid him, and a month after dismissal the plaintiff brought his action upon the agreement, stating, as the breach of it, that the defendant would not continue the plaintiff in his employ till the expiration of such month's notice, but discharged him in the middle of a year, without notice, but the declaration did not contain the common count for wages; it was held that the plaintiff could not, without that count (which he might have added), recover anything more than a month's wages, the loss of them being the damage he had sustained by not having received the month's notice agreed upon.

Taylor v. *Laird.*

The defendant having entered into a contract with the Lords of the Admiralty, to provide a steamer for exploring the Niger, wrote to the plaintiff, "I am willing to give you the command of the steamer destined for an exploring and trading voyage up the river Niger and its tributaries. Your pay to be *at the rate* of 50*l.* per month, commencing from 1st December, 1853, and a commission of 20 per cent. on the net proceeds of the produce you may bring down." Plaintiff replied, "In answer to your letter, offering me the command of the vessel to go out on a trading and exploring voyage to the river Niger and its tributaries, at *a fixed pay* of 50*l.* per month, and 20 per cent. on the net proceeds of the goods obtained, I beg leave to say I accept the service and the terms you mention." The vessel went up the Niger as far as D., when plaintiff refused to proceed further,

(*q*) See further as to damages, *post*, p. 112.

(*r*) As to the form of the declaration, see *Lush* v. *Russell*, 4 Exc. 637; *S. C.* 7 D. & L. 228.

(*s*) See *Elderton* v. *Emmens*, 6 C. B. 187; and *Beckham* v. *Drake*, 2 Ho. Lords Cases, 606.

(*t*) See *Goodman* v. *Pocock*, *post*, that he may recover damages for service during a broken period.

(*u*) *Hartley* v. *Harman*, 11A. & E. 798.

and abandoned the command: it was held that this was not an entire contract for the whole voyage, but one which gave a cause of action for each month's salary as each month accrued, which once vested was not divested by plaintiff's desertion or abandonment of his contract. And Pollock, C. B., said, "If this meaning is not given, the result would be, that had the plaintiff died, or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything. This cannot have been intended" (*x*).

Where wages payable at stated periods, and action brought for wrongful discharge, wages for broken period of service must be included in the damages.

But a servant, whose wages are payable at *stated periods*, as quarterly, and who is wrongfully discharged between those periods, as in the middle of a quarter, may, in this form of action, recover wages for the period of service which has elapsed since the last periodical payment of his wages, in the shape of damages for his master's breach of the contract between them. And if he elect to bring this action for his wrongful discharge, and wages for the broken period of service are not included in the damages recovered in it, he cannot afterwards recover them in an action for wages, as the action for wrongful discharge treats the contract of hiring and service as still in existence, while the action for wages earned in a broken quarter treats it as rescinded. And the servant cannot do both, that would be allowing him to blow both hot and cold (*y*).

To sustain this action servant must be ready and willing to serve;

but need not offer;

In order to enable a servant to maintain this action, he must be ready and willing to continue in his master's service at the time he is discharged (*z*). Ready does not imply willing (*a*), but ready and willing implies disposition, capacity and ability (*b*), *i. e.* not physical ability (*c*), but freedom from any other inconsistent engagement. For if the servant enter the service of another before his discharge, and is thereby disabled from serving his first master in the manner contracted for, he could not be said to be ready to serve him (*d*), and upon a traverse of that averment, his action would be defeated. But although it

(*x*) *Taylor* v. *Laird*, 1 H. & N. 266.

(*y*) *Goodman* v. *Pocock*, 15 Q. B. 576; *S. C.* 19 L. J., N. S., Q. B. 410. Therefore, if the declaration contain a count for wages as well as one for wrongful discharge, the plaintiff must be careful to take a verdict on *one* only of those counts, not on both; see *per* Coleridge, J., *ib.*

(*z*) See 2 Wms. Saund. 352, *et seq.*, notes to *Peters* v. *Opie*.

(*a*) *Granger* v. *Dacre*, 1 D. & L. 573; *S. C.* 12 M. & W. 431.

(*b*) *De Medina* v. *Norman*, 2 Dowl., N. S. 239; *S. C.* 9 M. & W. 827; *Wallis* v. *Warren*, 4 Exc. 364; *Griffith* v. *Selby*, 9 Exc. 394.

(*c*) A servant, who is ill, may nevertheless be ready and willing to serve, and a traverse of readiness and willingness, though a good plea on demurrer, would not be proved by evidence of servant's illness. *Cuckson* v. *Stones*, 28 L. J., Q. B. 25, *ante*, p. 85.

(*d*) *Spotswood* v. *Barrow*, 1 Exc. 804; *S. C.* 5 D. & L. 373, where a plea that the plaintiff entered the service of another was held bad on special demurrer, as being an argumentative traverse of his readiness to serve the defendant.

is necessary that he should be ready and willing and able to serve his master in order to enable him to sue his master for a wrongful discharge, it is not necessary that he should *offer* to do so (*e*), if he can prove his readiness, &c., in any other way. It is obvious, however, that an offer to discharge his duty is the best proof of his readiness to do it. And as readiness and willingness is a matter that is within his own mind only, the master ought at least to have *notice* of it (*f*).

should give notice.

Where the contract of hiring is *defeasible*, and either by express agreement or by the custom of the trade, business or occupation to which it relates may be determined by notice, care must be taken not to sue upon it as upon an *absolute* contract, or the action may be defeated on a plea of the general issue (*g*).

Defeasible contract must not be stated as an absolute one.

Where a declaration in an action for wrongful dismissal stated an absolute hiring for a year, the defendant was not allowed to plead, together with pleas in bar of the action, a plea varying the contract by stating it to be determinable on three months' notice and determined; and payment into court (*h*).

Hart v. *Denny*.

Where an action for wrongful discharge (the declaration in which also contained counts for wages and work and labour, &c.) was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from the defendant on the day when the action was commenced; but no claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and dismissal, might amount to such a claim; it was held that the plaintiff could not afterwards sustain another action for compensation in damages, in consequence of the dismissal from the defendant's employ, before the end of the year, but that the award of the arbitrator was a bar to such action (*i*).

Where action referred, award of arbitration a bar to second action.

Dunn v. *Murray*.

If, in an action for wrongful discharge, the defence insisted on is, that the defendant was justified in discharging the plaintiff, such defence must be specially pleaded (*k*), and cannot be given in evidence under the general issue (*l*). And so in an action for wages upon an implied contract, a defendant who has only

Defence, that discharge was justifiable, must be pleaded.

(*e*) *Wallis* v. *Warren*, 4 Exc. 361; *S. C.* 7 D. & L. 58; and see *Levy* v. *Lord Herbert*, 7 Taunt. 314. But see *Wilkinson* v. *Gaston*, 9 Q. B. 137.

(*f*) See *Doogood* v. *Rose*, 9 C. B. 137; see also *Armitage* v. *Insoles*, 14 Q. B. 728.

(*g*) *Metzner* v. *Bolton*, 9 Exc. 518; *Parker* v. *Ibbetson*, 27 L. J., C. P. 236, *ante*, p. 33.

(*h*) *Hart* v. *Denny*, 1 H. & N. 609.

(*i*) *Dunn* v. *Murray*, 9 B. & C. 780.

(*k*) Where, to an action for wrongful dismissal, the defendant pleaded that the plaintiff misconducted himself, without this that the defendant dismissed him without reasonable cause, upon which plea the plaintiff joined issue; it was held that the plaintiff's misconduct, as well as the fact of his dismissal, was in issue. See *Lush* v. *Russell*, 5 Exc. 203; *S. C.* 1 L. M. & P. 369. But see *Powell* v. *Bradbury*, 7 C. B. 201.

(*l*) *Speck* v. *Phillips*, 5 M. & W. 279. See the preceding Chapter as to what causes will justify the discharge of a servant.

pleaded the general issue, cannot go into evidence of misconduct, except such as goes to show that there was *no* implied contract to pay wages (*m*).

Damages.

The amount of damages which a servant would recover in an action for wrongful discharge, must, of course, depend on the nature of the contract, and the wages agreed to be paid. In the case of a domestic or menial servant (*n*), or where there was an express agreement for a month's notice (*o*), it would be a month's wages; but, generally speaking, the amount of damages is a question for the jury to determine. And in a recent case (*p*), in which a clerk, who had been hired for two years, was wrongfully dismissed after about one quarter's service, and then brought his action for such wrongful dismissal, and the jury awarded him a sum equal to twelve months' salary, the Court of Common Pleas refused to interfere, not considering the damages excessive. Where no specific wages have been agreed upon, the measure of damages is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained (*q*).

Servant employed abroad, expenses of return home.

French v. *Brooke*.

In a case where (*r*) the defendants, directors of a mining company in South America, agreed to employ the plaintiff as superintendent of mines for three years, at a salary increasing yearly, and the directors were at liberty to dissolve the agreement at any time on giving the plaintiff twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family. The directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary: it was held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and the jury having found for these sums only, the court refused to increase the verdict by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have terminated.

Cannot be hired before sheriff.

An action for wrongful dismissal being a claim for unliquidated damages, is not triable before the sheriff, under 3 & 4 Will. 4, c. 42, s. 17. The probable limit of the damages does not render it the less a claim for unliquidated damages (*s*).

Costs.

And the costs cannot be taxed on the lower scale given by the directions to the taxing officers, Trin. Term, 7 Vict., though the plaintiff recover less than 20*l*. (*t*).

(*m*) *Cooper* v. *Whitehouse*, 6 C. & P. 545.

(*n*) *Fewings* v. *Tisdal*, 1 Exc. 295.

(*o*) *Hartley* v. *Harman*, 11 A. & E. 798.

(*p*) *Smith* v. *Thompson*, 8 C. B. 44.

(*q*) See *per* Erle, J., in *Beckham* v. *Drake*, 2 Ho. Lords Cas. 606.

(*r*) *French* v. *Brooke*, 4 M. & P. 11; *S. C.* 6 Bing. 354.

(*s*) *Jacquot* v. *Boura*, 5 M. & W. 155; *Lismore* v. *Beadle*, 1 Dowl., N. S. 566.

(*t*) *Walther* v. *Mess*, 7 Q. B. 189.

OF THE COMMON ACTION FOR WAGES BROUGHT BY A SERVANT WRONGFULLY DISCHARGED.

Of the action for wages by servant wrongfully discharged.

This form of action treats the contract of hiring and service as *rescinded*. The ground on which a servant wrongfully discharged may support it is one equally applicable to all contracts; viz., that when one party to a contract has absolutely refused to perform something essential on his side of the contract, the other party is at liberty to rescind it, and sue for what he has already done under it upon a *quantum meruit* (*u*).

Amount recoverable in this action.

Where the servant elects to pursue this remedy *immediately* on his discharge, he can *only* recover wages for the period during which he has *actually served* (*x*). And it is conceived that even if he wait till the expiration of the period for which he agreed to serve, and then bring an action in this form, he cannot recover any more (*y*).

When this form of action cannot be brought.

And when a servant has refused to treat the contract of hiring and service as rescinded by his wrongful discharge, and has brought a special action against his master for such wrongful discharge, he cannot afterwards treat the contract as rescinded, and sue in this form of action for his wages during a broken quarter, they must be recovered in the special action, or not at all (*z*).

OF THE DUTY OF THE MASTER TO PAY THE SERVANT HIS WAGES, AND THE SERVANT'S REMEDIES TO RECOVER THEM.

Default; Bankruptcy; Death; of Master. Default; Death; of Servant.

The master is not bound to pay wages unless he has contracted to do so.

Unless the circumstances under which services of any sort have been rendered by one person to another are such as to afford evidence of a contract, either express or implied, on the part of the person served to pay for them, there is no duty binding him to do so; and it is clear that the servant cannot maintain any action for wages for such services (*a*).

(*u*) See 2 Smith's L. C. 18, note to *Cutter* v. *Powell*, where the cases are collected. *Planche* v. *Colburn*, 8 Bing. 14; *Archard* v. *Horner*, 3 C. & P. 349; *Smith* v. *Hayward*, 7 A. & E. 544; *Fewings* v. *Tisdal*, 1 Exc. 295. See also *Robins* v. *Power*, 27 L. J., C. P. 257; *Preskitt* v. *Badger*, 1 C. B., N. S. 296; *Berwick* v. *Horsfall*, 31 L. T. 117.

(*x*) *Smith* v. *Hayward*, 7 A. & E. 544; *Fewings* v. *Tisdal*, 1 Exc. 295. See as to the form of particulars of plaintiff's demand, *Harris* v. *Montgomery*, 2 L. M. & P. 425; *Hurcum* v. *Stericker*, 10 M. & W. 553.

(*y*) *Ante*, p. 108, note (*m*).

(*z*) *Goodman* v. *Pocock*, 15 Q. B. 576.

(*a*) See *Foord* v. *Morley*, Fost. & F. 496. The mere existence of a valid contract of hiring and service does not necessarily imply a contract to pay wages; as it often happens with boys and others that their board, lodging and clothes, together with the opportunity of learning their master's business, or the latter consideration alone, is a sufficient compensation for their services. See *R.* v. *Shinfield*, 14 East, 541.

Slaves nonsuited.

Upon this principle Lord Mansfield always nonsuited slaves who had been brought over to England and commenced actions for wages (*b*). And where a person, who had been a slave in the West Indies on an estate belonging to a lady, came over with her to England, and continued in her husband's service in England, Lord Kenyon held, that he could not maintain any action for wages against the husband, without some evidence of a promise by him to pay them, as there was no original contract of service for wages (*c*).

Alfred v. *Fitzjames.*

Brothers living together.

Davies v. *Davies.*

And so where a man and wife lived with his brother, and assisted him in carrying on his business, it was held to be clear that he and his wife were not entitled to be paid for their services, unless the jury were satisfied that there was a contract express or implied on the part of the defendant to pay for such services (*d*).

So master not bound to pay increased wages, for increased labour, unless he has contracted to do so.

Bell v. *Drummond.*

Upon similar principles it is equally clear, that where a stipulated remuneration has been agreed upon, the servant has no claim to *additional* remuneration on the mere ground of his performance of additional services; unless he can prove some contract, either express or implied on the part of his master, to pay him an increased salary for his additional services, he can recover no remuneration for them. Thus, where a clerk to the commissioners of land-tax employed the plaintiff as his deputy at a salary of 100*l.* a year, and on new duties being imposed, which gave the clerk additional work, the plaintiff also performed that, it was held, that he was not legally entitled to any additional salary on that account: Lord Kenyon observing, that if he was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages (*e*).

Clutterbuck v. *Coffin.*

And where A. is B.'s servant, a promise by C. to pay A. additional wages would be void, as being without consideration, all his services being sold to B. (*f*). Though it would be otherwise if C. originally induced A. to enter B.'s service by a promise of wages, in addition to those paid by B. (*g*).

Contracts with sailors to pay increased wages void;

unless free from original articles.

And so where a sailor was under articles for a voyage out to M. and home, and on arrival at M. the captain, in consequence of the desertion of some of the crew, promised him double wages to induce him to remain, it was held that he could not sue the shipowners for such double wages, as he was not free from his original contract (*h*). But if anything had occurred to set him free from his articles, as if the prosecution of the voyage would be dangerous to life, in which case he would not be bound to proceed at the risk of his life, in such case a sailor might sue for a promised increase of wages (*i*).

(*b*) *R.* v. *Thames Ditton*, 4 Doug. 300.

(*c*) *Alfred* v. *Fitzjames*, 3 Esp. 3.

(*d*) *Davies* v. *Davies*, 9 C. & P. 87.

(*e*) *Bell* v. *Drummond*, Peake, 45; and see *Harris* v. *Watson*, Peake, 72.

(*f*) *Carter* v. *Hall*, 2 Stark. 361, *ante*, p. 2.

(*g*) *Clutterbuck* v. *Coffin*, 3 M. & G. 842.

(*h*) *Harris* v. *Carter*, 3 E. & B. 559.

(*i*) *Hartley* v. *Ponsonby*, 26 L. J., Q. B. 322.

It has been held, that upon a simple dissolution of a special contract of hiring and service, no new contract arises, by implication of law, in respect of services performed under such special contract, previously to its being so dissolved (*k*). There is no implied contract to pay wages on simple dissolution of special contract.

Where, therefore, the plaintiff was engaged as superintendent of packets in the service of a steam boat company at a yearly salary, payable quarterly, and a month after the termination of one of the years of the service, tendered his resignation, which after another month was accepted, but nothing was said about remuneration for the time elapsed since the termination of the last year's service, it was held, that the law would not imply an engagement to pay for the services performed during that time, but that it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for. In fact, it may be said to be a question for a jury in all cases where services have been rendered without any express contract to pay for them, whether or not there was an implied contract to do so. *Lamburn* v. *Cruden.* Whether or not there is an implied contract is a question for a jury.

In such cases the defendant may give such evidence as goes to show that the circumstances, from which the plaintiff would induce a jury to imply a contract to pay wages, do not warrant any such inference; as that the plaintiff cohabited with him, since that goes to show that the contract was not one of hiring and service, but of a different nature (*l*). Or the defendant may show that the plaintiff misconducted himself in such a manner as to rebut any inference of an implied contract to pay for his services (*m*). But unless such evidence shows that there were *no* implied *contract at all*, the plaintiff's misconduct should be specially pleaded. Both the plaintiff and defendant may also give evidence of the value of the services rendered (*n*). Evidence to rebut inference of implied contract.

It sometimes happens that, by the terms of the agreement entered into, it is left to the employer to determine whether or not *any* remuneration should be paid for services rendered, and what amount should be paid. In such cases, if it appear *clearly* to have been the intention of the parties that the employer should decide whether or not he would make *any* remuneration for the services rendered, no action can be maintained against him by the person employed, unless the employer has, after the performance of the work, expressly promised to pay something. Where left to employer to decide whether any and what wages should be paid. No action can be maintained.

Thus, where a person performed work for a committee under a resolution that any service to be rendered by him should at a certain time be "taken into consideration, and such remuneration be made as should be deemed right," it was held, that *Taylor* v. *Brewer.*

(*k*) *Lamburn* v. *Cruden*, 2 M. & G. 253.

(*l*) *Bradshaw* v. *Hayward*, Carr. & M. 591.

(*m*) *Cooper* v. *Whitehouse*, 6 C. & P. 345; *Speck* v. *Phillips*, 5 M. & W. 281. See *Monkman* v. *Shepherdson*, 11 A. & E. 411, where to an action for wages the defendant pleaded an agreement that the plaintiff should have none if he got drunk, &c.

(*n*) *Baillie* v. *Kell*, 4 Bing. N. C. 638; *Bird* v. *M'Gaheg*, 2 Carr. & K. 707, *post*, p. 117.

no action would lie to recover remuneration for such work, as the person employed threw himself upon the mercy of the committee who were to judge whether he should have anything, and if anything, then how much (*o*).

Roberts v. *Smith.*

So where (*p*) the plaintiff wrote to the defendant and agreed to accept the appointment of secretary to a joint stock company, at a yearly salary of 300*l.*, "if the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labour you may think me deserving of, and your means can afford." The defendant, in replying, said, "It is distinctly agreed and understood that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right, as compensation for labour done, in the event of the company not being carried out." The company was never registered or carried out. And it was held that the plaintiff could not sue the defendant for compensation for services rendered towards registering the company.

Gratuity at end of year.

And upon the same principles no action would lie for a gratuity promised at the end of the year (*q*).

Ex parte Metcalfe.

And upon similar principles the Court of Queen's Bench have refused (*r*) to grant a mandamus to a Local Board of Health to pay a reasonable remuneration to a person who presided at the first election of the board, upon a suggestion that they had allowed only an inadequate sum; the board having, under the Public Health Act (*s*), a discretion as to what sum they think reasonable to allow, and the exercise of their discretion in this respect not being subject to review.

If remuneration intended, but amount not settled, fair wages may be recovered.

But if it appears from the agreement to have been the intention of the parties that the servant *should be remunerated* (*t*), but the *amount* of his remuneration was not settled, he will be entitled to recover upon the *quantum meruit* the fair value of his services, and the defendant may of course show that they were not so valuable as the plaintiff would make out (*u*).

Peacock v. *Peacock.*

Thus, where (*x*) a law stationer said to his son on coming of age, "You shall have fifteen shillings a week till October; the books will then be made up, and you shall have *a share;* we need not talk of the share till October comes; we shall settle it then," Lord Ellenborough held that the son was evidently

(*o*) *Taylor* v. *Brewer*, 1 M. & S. 290; see *Moffatt* v. *Dickson*, 13 C. B. 575; *Moffatt* v. *Laurie*, 15 C. B. 583.

(*p*) *Roberts* v. *Smith*, 28 L. J., Exc. 164.

(*q*) See *Parker* v. *Ibbetson*, 27 L. J., C. P. 236, *ante*, p. 33.

(*r*) *Ex parte Metcalfe*, 6 E. & B. 287.

(*s*) 11 & 12 Vict. c. 63, s. 30.

(*t*) As is generally the case where professional men are employed. In such cases, however, the onus lays upon the plaintiff to make out his case, if the *employer* raise a doubt whether the services were not to be gratuitous, *Hingeston* v. *Kelly*, 18 L. J., N. S., Exc. 360. See *Moffatt* v. *Laurie*, 15 C. B. 583.

(*u*) *Baillie* v. *Kell*, 4 Bing. N. C.

(*x*) *Peacock* v. *Peacock*, 2 Campb. 45.

entitled to a beneficial interest in the business, leaving the amount to be settled when the books should be balanced, and that the jury must consider what was a fair and just proportion for the father to give and the son to expect after what had passed between them.

Bryant v. *Flight.*

So where (*y*) A. agreed to enter into the service of B., and wrote to him a letter as follows:—"I hereby agree to enter your service as weekly manager, commencing next Monday: and the amount of payment I am to receive I leave entirely to you." And A. served B. in that capacity for six weeks: it was held (Lord Wensleydale, dissentiente) that the contract implied that A. was to be paid something at all events for the services performed, and that the jury in an action on a *quantum meruit* might ascertain what B., acting *bonâ fide*, would or ought to have awarded.

Bird v. *M'Gaheg.*

And where (*z*) a verbal agreement had been made on behalf of a board of guardians with the surgeon, to attend a number of pauper children who had been attacked by Asiatic cholera, for which he was to receive *whatever remuneration the board of guardians should allow as right and proper*, and he attended them for several weeks, after which the board tendered him 50*l.* as a remuneration: it was held by Maule, J., that he might maintain an action for what was right and proper, and left it to the jury to ascertain what the board, acting *bonâ fide*, ought to have awarded.

Rawlings v. *Chandler.*

Where the plaintiff had by letter agreed that his salary was to be paid only in the event of the success of the undertaking, it was held that there was evidence to go to the jury that the plaintiff had a right to receive something for his services (*a*).

If wages depend on certificate of third person, the obtaining it is a condition precedent to right of action.

If either of the above questions depend upon the certificate of a third person, the obtaining such certificate is in general a condition precedent to the right of the servant to maintain any action, and if it is withheld by such third person even by fraud, no action for wages can be maintained by the servant. His remedy is an action against the third person for withholding the

(*y*) *Bryant* v. *Flight*, 5 M. & W. 114; but see *Roberts* v. *Smith*, 28 L. J., Exc. 164, *ante*, p. 116.

(*z*) *Bird* v. *M'Gaheg*, 2 Carr. & K. 707. In this case evidence was admitted of the scientific skill of the plaintiff. See *Baxter* v. *Gray*, 3 M. & G. 771, where a surgeon, who had attended a patient in expectation of a legacy, was allowed to maintain an action for his services against the patient's executors, having been disappointed of his legacy. See also *Hulse* v. *Hulse*, 17 C. B. 711, which was an action on a promissory note given by a moribund uncle to a nephew who had been his clerk for many years at a guinea and 30*s.* a-week; and had also rendered other services, which continued up to the death of the uncle. The question was, whether there was any consideration for the note, and Jervis, C. J., said, "In order to make *future services* a good consideration for the giving of the note, we think it was incumbent on the plaintiff to show that there was some *contract* for future services which might have been enforced by the giver of the note if the recipient omitted to perform it."

(*a*) *Rawlings* v. *Chandler*, 9 Exc. 687.

certificate (*b*), as until he has spoken no right can arise, which can be enforced either at law or in equity. In a case (*c*) therefore, where the plaintiff agreed to serve the defendant as apothecary's assistant for one year gratuitously, and after that to receive such salary as C. should think reasonable, and it appeared that no application had been made to C. to fix any salary, it was held that the plaintiff could not recover any salary.

Owen v. *Bowen.*

Truck Act.

By the Truck Act (*d*), which does not apply to domestic servants or servants in husbandry (*e*), the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm, is prohibited.

Against whom action should be brought.

Collector of poor rates.

The action for wages should of course be brought against the person by or for whom the plaintiff was hired. But it by no means necessarily follows that the person appointing to an office or situation is liable to pay the salary, *e. g.*, in the case of collector of poor rates, the guardians appoint, but are not liable to be sued for the collector's salary, which is charged on the poor rate by 4 & 5 Will. 4, c. 76, s. 46 (*f*).

Minister appointed by trustees.

Cooper v. *Whitehouse.*

Servant to partners.

Beckham v. *Knight.*

Where a dissenting minister was appointed to a chapel by *part* of the trustees, but received a notice discharging him and demanding possession of the chapel signed by *all* the trustees, upon which he sued them *all* for his salary, he was nonsuited (*g*). But in the case of a servant engaged by one of several partners, *all* the partners would be liable if the contract was made in respect of the partnership (*h*), although the contract was in writing (not being by deed), and signed by one only. However where one proprietor of a newspaper contracted with a person to write articles for it, other proprietors, who were no parties to the contract, cannot be made liable to pay the salary of such person by means of the statute 6 & 7 Will. 4, c. 76 (*i*).

Writer of article in newspaper.

Projector and

And where (*h*) the plaintiff *himself* was a promoter of a pro-

(*b*) See *Morgan* v. *Birnie*, 9 Bing. 673; *Milner* v. *Field*, 5 Exc. 829, which were cases of building contracts where the architect's certificate had not been obtained. See also *Grafton* v. *Eastern Counties Railway*, 8 Exc. 699; *Glenn* v. *Leith*, 1 C. L. R. 569; *Scott* v. *Avery*, 5 Ho. Lords Cas. 811; *Scott* v. *Corporation of Liverpool*, 28 L. J., Ch. 230; *Munro* v. *Butt*, 8 E. & B. 738.

(*c*) *Owen* v. *Bowen*, 4 C. & P. 93.

(*d*) 1 & 2 Will. 4, c. 37. On the construction of this act, see *Chawner* v. *Cummings*, 8 Q. B. 311 (which was upheld in *Archer* v. *James*, in Q. B., 1 Law Times, N. S. 26; *Riley* v. *Warden*, 2 Exc. 59; *Sharman* v. *Saunders*, 13 C. B. 166; *Ingram* v. *Barnes*, 26 L. J., Q. B. 82.

(*e*) Sect. 20. The trades to which it does apply are specified in sect. 19, *post*, Appendix.

(*f*) *Smart* v. *Guardians of West Ham Union*, 10 Exc. 867.

(*g*) *Cooper* v. *Whitehouse*, 6 C. & P. 545.

(*h*) *Beckham* v. *Knight*, 1 M. & G. 738; *Drake* v. *Beckham*, 9 M. & W. 79; *S. C.* 11 M. & W. 315; 2 Ho. Lords Cas. 579, 623.

(*i*) *Holcroft* v. *Higgins*, 2 C. B. 488.

(*k*) *Wilson* v. *Viscount Curzon*, 15 M. & W. 532; see *Holmes* v. *Higgins*, 1 B. & C. 74; *Milburn* v. *Codd*, 7 B. & C. 419. A claim by one partner against his copartner is the proper subject of a bill in equity.

jected joint stock company, it was held that he could not sue a member of the provisional and managing committee for salary alleged to be due to him for services as the secretary to the projected company. And Lord Wensleydale said:—"If it were a transaction among ordinary persons the evidence might be sufficient to make out a *primâ facie* case against the persons who signed or sanctioned the employment of the party, that he was to be a paid secretary. But when we have the additional fact that he is himself one of the original promoters and projectors of the company, more evidence is necessary than in the case of a mere stranger; and the question is, whether he is not so implicated in the scheme that all the acts of the provisional committee are to be considered as his acts, and consequently that he is one of his own employers. The provisional committee are a delegated body, acting for others; and, *primâ facie*, any contract they make is made on behalf of those who appointed them, and orders given by them are *primâ facie* the orders of all the projectors, including the plaintiff. The plaintiff, therefore, was bound to give further evidence to show that the defendant meant to contract as a principal, independently of his acts as a provisional committeeman of the company. On the facts in evidence in this case no such intention appears." Secretary of company. *Wilson* v. *Viscount Curzon.*

However, where an express agreement with the plaintiff was entered into by a committee for obtaining a Turnpike Road Act to do certain work, and the plaintiff afterwards became a subscriber, it was held that he was not thereby precluded from recovering for work done under such express contract before he became a subscriber (*l*). *Lucas* v. *Beach.*

Where three partners engaged the plaintiff by an agreement in writing to serve them as foreman for a certain period, but before that period had elapsed, one of the three retired, and the plaintiff continued to serve the other two, for some years, and they afterwards became bankrupt, whereupon the plaintiff was dismissed by their assignees: it was nevertheless held that he might still sue all the three partners upon the original agreement, which was not rescinded (*m*). *Dobbin* v. *Foster.*

Where the amount sought to be recovered for wages is under 50*l*., the plaintiff may sue for them in the County Court (*n*), or if the cause of action arise in London, in the Sheriffs' Court (*o*), or Lord Mayor's Court (*p*). Where the amount is under 20*l*., he must sue in the inferior courts, or he will lose his costs (*q*). And, in certain cases, wages of small amount due to workmen and labourers may be recovered by summary proceeding before a magistrate (*r*). When to sue in County Court; or proceed before justices.

Where by his particulars of demand the plaintiff claimed Particulars

(*l*) *Lucas* v. *Beach*, 1 M. & G. 417.

(*m*) *Dobbin* v. *Foster*, 1 C. & K. 323; see *Hobson* v. *Cowley*, 27 L. J., Exc. 205, *ante*, p. 10.

(*n*) 13 & 14 Vict. c. 61.

(*o*) 15 & 16 Vict. c. lxxvii.

(*p*) 20 & 21 Vict. c. clvii.

(*q*) Although suing *in formâ pauperis*. *Chinn* v. *Bullen*, 8 C. B. 447; *S. C.* 7 D. & L. 297; 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; and see *Lyons* v. *Hyman*, 1 L. M. & P. 601; *East Anglian Railway Company* v. *Lythgoe*, 2 L. M. & P. 221.

(*r*) See Chap. IX. *post*.

of demand.

wages, it was held that he would not recover a claim for a per centage by way of commission on business introduced by him to the defendant (*s*).

Set-off.

A master cannot set off, against a claim for wages, money paid by him to his own medical attendant, for attendance on a servant, unless there was a special agreement between the master and servant that he should do so (*t*). Nor can he set off against a claim for wages due to a female servant under age, money advanced by him to her, to purchase a silk dress and other articles not necessary for a person in her station in life (*u*), nor coach fare paid for the mother of such servant (*x*). Nor can he set off, even by way of equitable defence (*y*), damages sustained by him through the servant's negligence (*z*); but if it can be proved to have been part of the original contract that the servant should pay out of his wages the value of his master's goods lost through his negligence, that would be tantamount to an agreement that the wages should be paid only after deducting the value of the things so lost, which would be a good defence under the general issue (*a*).

Payment, presumption of.

It sometimes happens that wages which have actually been paid are again demanded in consequence of no receipt having been taken. In such cases, the courts will sometimes presume, from the lapse of time or other circumstances, that they have been paid, and the servant will not be allowed to recover in an action for them.

From course of business.

Thus, in a case tried many years ago at Guildhall, which was an action by a workman at a sugar refiners, a witness proved that the plaintiff had worked there for more than two years. But Abbott, C. J., said that he should direct the jury to presume that men employed in that way were regularly paid every Saturday night, unless some evidence was given on the part of the plaintiff to satisfy the jury that the plaintiff had, in point of fact, never been paid; and as no such evidence was produced, the plaintiff was nonsuited (*b*).

Lapse of time.

And in an action for wages, as a menial servant, Gaselee, J., ruled that in the regular course, if a servant has left a considerable time, the presumption is, that all the wages have been paid (*c*).

BANKRUPTCY OF MASTER.

The payment of wages due to clerks, servants, and workmen, in the event of their master's bankruptcy, is provided for by the

(*s*) *Law* v. *Thompson*, 15 M. & W. 541; *S. C.* 4 D. & L. 54.

(*t*) *Sellen* v. *Norman*, 4 C. & P. 80.

(*u*) *Hedgeley* v. *Holt*, 4 C. & P. 104.

(*x*) *Ib.*

(*y*) *Stimson* v. *Hall*, 1 H. & N. 831.

(*z*) *Le Loir* v. *Bristow*, 4 Camp. 134.

(*a*) *Per* Lord Ellenborough, *ibid.*; and see *per* Lord Abinger in *Cleworth* v. *Pickford*, 7 M. & W. 320.

(*b*) Note to 4 C. & P. 81; see also *Lucas* v. *Novosilieski*, 1 Esp. 296.

(*c*) *Sellen* v. *Norman*, 4 C. & P. 80. In a note to this case the reporter says with truth, "It would often save persons great inconvenience and expense if, when they paid a servant's wages, they took a regular receipt."

"Bankrupt Law Consolidation Act, 1849" (*d*), by sect. 168 of which it is enacted, that when any bankrupt shall have been indebted at the time of issuing the fiat or filing the petition for adjudication of bankruptcy to any *servant or clerk* (*e*) of such bankrupt, in respect of the wages or salary of such servant or clerk, it shall be lawful for the court, upon proof thereof, to order so much as shall be so due, not exceeding three months' (*f*) wages or salary, and not exceeding 30*l.*, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove for any sum exceeding such amount.

Court may order three months' wages or salary to clerks or servants.

This very humane and beneficial enactment appears to have been originally borrowed from the Scotch law (*g*). The first positive enactment on the subject contained in the English bankrupt law, was the 6 Geo. 4, c. 16, s. 48. Before the passing of that act, a practice prevailed of paying clerks and servants full six months' wages out of the bankrupt's estate; and the operation of the act, which empowered the commissioners to order payment of so much as should be due, not exceeding six months' wages, was to legalize that practice (*h*). The 6 Geo. 4, c. 16, however, (as well as the 5 & 6 Vict. c. 122, which reduced the amount to three months' wages,) is now repealed, and the enactment above set forth is the one at present in force. But as the decisions upon 6 Geo. 4, c. 16, s. 48, are in many respects applicable to the present law, which, as it will have been observed, only differs from the previous acts in the amount which may be ordered to be paid, it will be convenient to set before the reader some of the more important and useful of those decisions.

Practice previous to 6 Geo. 4, c. 16, s. 48.

Decisions under 6 Geo. 4, c. 16, s. 48.

Under that act it was held that the bankruptcy of the master (*i*) did not operate to dissolve a contract of hiring, and that the master might, notwithstanding his bankruptcy and certificate, be liable to pay the servant his wages. Thus, in an action for wages (to which the defendant pleaded his bankruptcy and certificate), where it appeared that the plaintiff, in October, 1826, entered as clerk into the service of the defendant, an auctioneer, at a salary of 60*l.* per annum. The defendant

Thomas v. *Williams.*

Bankrupt liable to pay wages of servant working after commission.

(*d*) 12 & 13 Vict. c. 106.

(*e*) As to labourers and workmen, *vide post*, p. 125.

(*f*) By the Interpretation Clause, sect. 276, the word "month" means calendar month. The 5 & 6 Vict. c. 122, ss. 28, 93, was in similar terms. But the corresponding enactment in the old Bankrupt Act, 6 Geo. 4, c. 16, s. 48, whereby the commissioners had power to order payment of *six* months' wages to servants and clerks, was held to mean six *lunar* months, *Ex parte Humphreys*, 1 Mont. & Bligh, 413; 3 Deac. & Chit. 114.

(*g*) See a learned note of the reporters, Mont. & M. 101, citing 2 Bell Comm. 164; and see *Ex parte Crawfoot*, Mont. & M. 275. There is a similar provision in the Code Napoleon, Code Civil, l. 3, t. 18, art. 2101.

(*h*) See *per* Lord Denman in *Thomas* v. *Williams*, 1 A. & E. 690. The assignees of a bankrupt, or insolvent, cannot let out for hire his personal services, necessary for his maintenance, *Williams* v. *Chambers*, 10 Q. B. 337.

(*i*) *Thomas* v. *Williams*, 1 A. & E. 685; *S. C.* 3 Nev. & M. 545.

became bankrupt, and a commission issued on the 10th of July, 1828. He had been imprisoned about a month before that time under an Exchequer process, at the suit of the Crown, and remained in prison a year after the commission had issued. From the commencement of the imprisonment till the issuing of the commission, and *for ten days after*, the defendant's business was conducted by his brother. The plaintiff attended from October, 1826, as long as the brother conducted the business, but ceased to do so when the brother ceased to conduct the business, and when he ceased, 10*l.* wages were due *pro ratâ;* it was left to the jury to say whether the contract had been dissolved *after the issuing of the commission* by mutual consent; and they found that it had. In the following term a motion was made for a rule to enter a nonsuit, on the ground that the bankruptcy operated to dissolve the contract. But the rule was refused, and Lord Denman said, "That the 48th sect. of 6 Geo. 4, c. 16, made no alteration in the legal effect of the contract of hiring, and, consequently, that as the wages had not become due at the time of the commission, either by efflux of time or by a dissolution of the contract, the bankrupt certificate forms no defence to this action;" and added, "that no inconvenience was likely to occur from his decision, as persons in the plaintiff's situation must be expected to avail themselves of the section above referred to."

It will be observed, however, that in *Thomas* v. *Williams*, the plaintiff *continued to act* as the defendant's clerk *after* the commission issued; and, therefore, it was unnecessary to decide, and that case cannot be considered as an authority, that where a servant, whose wages are due periodically, ceases to act *immediately* on his master becoming bankrupt, the master will be liable, after he has obtained his certificate, to an action for wages for such period as may have elapsed between the last time when wages became due and the bankruptcy. In such case it is conceived that the certificate would be a bar; since the bankruptcy, and the fact that the servant thereupon ceased to serve, would be evidence from which might be inferred a dissolution of the contract of hiring by mutual consent, *and* an agreement that the servant should be paid *pro ratâ* for the broken period of service (*k*). It can only be on the ground that the contract of hiring *is rescinded*, that a servant, whose wages are due periodically, is entitled, on his master's bankruptcy, to be paid in full wages for a *broken period of service*—for the Act of Parliament only authorizes the payment of wages in full where the master *shall have been indebted* at the time of issuing the fiat—and unless the contract was rescinded, he was not indebted. And it must be borne in mind, that this provision, which gives a preference to one class of creditors over another, must on that account be construed strictly (*l*).

Service must be under a contract of hiring.

And in order to entitle a servant to the benefit of the above provision of the bankrupt law, Lord Eldon held, that his service must have been rendered under *a contract* of hiring. And, therefore, where a son had lived with his father seven years as a

(*k*) See *Lamburn* v. *Cruden*, 2 M. & G. 253.

(*l*) See *Ex parte Hampson*, 2 Mont. D. & D. 462.

clerk, receiving only board and lodging, and there was no actual contract for wages,—though the father swore it was always his intention to pay him something for his services, and the assignees did not object,—yet Lord Eldon, though he lamented the hardness of the case, said, "that as there was in reality no contract for wages, he could make no order for the son to prove" (*m*). *Ex parte Glover.*

But it seems to have been considered, that there was no general rule as to what hiring was sufficient to entitle a servant or clerk to the benefit of the act 6 Geo. 4, c. 16, s. 48 (*n*). However, weekly labourers and workmen, employed as excavators, were considered not to come within the meaning of that section (*o*). But it was not thought necessary that the service should be under a yearly hiring, though there must have been an engagement of a more permanent nature than a weekly hiring (*p*). And, therefore, where an overlooker or manager of a cotton mill was engaged at 33*s.* per week, but subsequently a contract was entered into that he should be paid 104*l.* per annum, to be paid in weekly sums, he was held to come within the act (*q*). And a person engaged as traveller, at an annual salary, was also held within the act (*r*). And where a person entered into an agreement with his father, to serve him as clerk and foreman in consideration of two suits per annum and two guineas a week, he was held within the act (*s*). What contracts within the statute. No general rule. Weekly hiring not sufficient. Yearly hiring not necessary.

And it was also held, that the mate of a vessel, hired by the bankrupt, who was master and part owner, under a verbal agreement, was entitled to six months' wages (*t*). Mate of vessel.

And a French teacher in a school at Brighton has been held to be within 12 & 13 Vict. c. 106, s. 168, and entitled to a quarter's salary (*u*). French master.

The provision as to clerks is not limited to trade clerks, nor is it necessary that the trading should have continued during the whole of the period for which wages are claimed (*x*). Who are clerks.

A trader borrowed 550*l.* under an agreement, by which the lender was to become his clerk at a salary of 222*l.* 10*s.* per annum, the trader to produce his accounts and balance sheet to the lender, who was to collect debts and alone draw cheques. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender to have the option of becoming a partner. *Ex parte Harris.*

(*m*) *Ex parte Glover*, 1 Mont. Dig. 165; see Deac. & De G. on Bankr. vol. i. 261, 262.

(*n*) *Per* Sir G. Rose, *Ex parte Collyer*, 2 Mont. & A. 29; *S. C.* 4 D. & C. 520.

(*o*) *Ex parte Crawfoot*, Mont. 270; *Ex parte Skinner*, Mont. & Bli. 417; *S. C.* 3 D. & C. 332, where a coach-guard and weekly servant at 2*l.* per week was held not to be entitled to the benefit of the act. See now sect. 169, *post*, p. 125.

(*p*) *Ex parte Collyer, ubi supra.*

(*q*) *Ibid.*

(*r*) *Ex parte Neal*, Mont. & M. 194.

(*s*) *Ex parte Humphreys*, Mont. & Bli. 413; *S. C.* 3 D. & C. 114.

(*t*) *Ex parte Homborg*, 2 Mont. D. & D. 642.

(*u*) *Ex parte Collinet*, 1 Bank. & Ins. Rep. 82.

(*x*) *Ex parte Gough*, Mont. & B. 417.

The trader became bankrupt, and it was held that the lender was a clerk, and entitled to three months' salary in full, under 12 & 13 Vict. c. 106, s. 168; and, also, that his having been absent from business, owing to ill health, for the three months immediately preceding the bankruptcy, with the bankrupt's leave, did not take away this right (*y*).

Ex parte Hickin.

A. entered the service of B., as book-keeper and cashier, in 1844, and remained till December, 1848, without any agreement being made as to the amount of his salary, but he drew small sums from time to time. A. stated that in December, 1848, it was agreed between him and B. that his salary should be at the rate of 250*l.* per annum from 1844, and that the reason why no arrangement was made before was, that B. was making experiments in a manufacture, from which he hoped to derive a large fortune, out of which A. expected to be paid. B. became bankrupt in February, 1849, and A. was allowed to prove for his salary (*z*).

Clerk leaving service six months before fiat, in consequence of act of bankruptcy, within the act.

In a case (*a*), in which it was decided that a clerk who *left the bankrupt's service six months before the fiat* issued, on account of his having assigned all his property in trust for his creditors, thereby putting it out of his power to pay the clerk, was entitled to six months' wages, under 6 Geo. 4, c. 16, the court pronounced no opinion whether servants *voluntarily quitting* the service of their masters did or did not come within section 48. The ground, however, on which that case was decided was, that although there was an interval of six months between the quitting of the service and the fiat, yet the servant quitted in consequence of his master having assigned all his estate and effects, and thereupon ceased to carry on his trade, which was an act of bankruptcy, whereby the servant lost his employment as well as his wages (*b*).

Query, as to servant voluntarily quitting.

Such a servant not within the act after he had allowed a dividend to be declared.

But in another case (*c*), where it appeared that about twelve months before the bankruptcy, the bankrupt compounded with his creditors, and it was then agreed between the bankrupt and his clerk that he should quit the service of the bankrupt, and that a year's wages, amounting to 250*l.*, should remain as a debt instead of being included in the composition. And the clerk then quitted the service and obtained another similar situation, the bankrupt's son succeeding him as clerk to the bankrupt, and the trade being carried on as usual for another year, when the bankruptcy took place. The clerk was not allowed six months' wages in full after he had allowed a first and final dividend to be declared.

Workmen by the piece not within act.

And it was held that the workmen of a coachmaker, who worked by the piece, and received a specified sum for each particular job under separate and distinct contracts, and where there was no hiring for a specific time, were not servants within 6 Geo. 4, c. 16, s. 48 (*d*).

(*y*) *Ex parte. Harris*, 1 De G. 165.

(*z*) *Ex parte Hickin*, 19 L. J., Bank. 8.

(*a*) *Ex parte Saunders*, 2 Mont. & A. 684.

(*b*) *Ex parte Gee*, Mont. & Ch. 108.

(*c*) *Ibid.*

(*d*) *Ex parte Grellier*, Mont. & M. 95.

Semble, that misconduct of servant would deprive him of benefit of act.

It would seem, however, that if the misconduct of the clerk has been such as would have justified his dismissal without wages, he might be deprived of his right to be paid his wages in full (*e*).

Out of what monies wages to be paid.

And it is to be observed, that the payment of wages is not to be out of the *first* monies got in, but as soon as there is a sufficient fund for the purpose after providing for the expense of working the fiat (*f*).

Court may order wages not exceeding 40*s.* to labourer or workman.

And by 12 & 13 Vict. c. 106, s. 169 (*g*), it is also enacted, that when any bankrupt shall have been indebted at the time of issuing the fiat, or filing the petition for adjudication of bankruptcy, to any *labourer or workman* of such bankrupt in respect of the wages or labour of such labourer or workman, it shall be lawful for the court, upon proof thereof, to order so much as shall be so due, not exceeding 40*s.*, to be paid to such labourer or workman out of the estate of such bankrupt; and such labourer or workman shall be at liberty to prove for any sum exceeding such amount.

Colliers' drawers.

Where coal proprietors employed colliers to whom work was let off at so much per score baskets, and each collier had a drawer attached to him, it was held that as the drawers could not have maintained an action against the proprietors for their wages, they were not entitled to wages under this section (*h*).

DEATH OF MASTER.

Discharges servant.

By the death of the master the servant is discharged (*i*); and the sureties to a bond for the faithful service of the servant are released (*k*). And it seems that where there is no custom upon the subject which can be imported into the contract, and the service is under an *entire contract* for a year's service and a year's pay, if the master dies in the middle of the year the servant is not legally entitled to *any* wages for a broken period of service.

Where contract for an entire year's service, servant not strictly entitled to any wages.

Countess of Plymouth v. *Throgmorton.*

Thus, where (*l*) debt was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for

(*e*) *Ex parte Hampson*, 2 Mont. D. & D. 462.

(*f*) *Ibid.*

(*g*) See the corresponding enactment in 5 & 6 Vict. c. 122, s. 29.

(*h*) *Ex parte Ball*, 3 De G., M. & G. 155.

(*i*) Wentw. Off. Ex. 141, 14th edit.; Wms. Exors. 644. But see *R.* v. *Ladock*, Burr. S. C. 179; 2 Bott. 277; 1 Nol. P. L. 461, where it was held that a pauper gained a settlement by serving out the year with the executors of the master, who died in the middle of the year; on the ground that the service to the executors was a continuance of *the same service and not a new contract*. And see also *Jackson* v. *Bridge*, 12 Mod. 650. A contract of apprenticeship, in so far as it was a personal contract, is put an end to by the death of the master, *R.* v. *Peck*, 1 Salk. 66; *Baxter* v. *Burfield*, 2 Str. 1266; Bac. Abr. "Master and Servant," G.

(*k*) *Barker* v. *Parker*, 1 T. R. 287.

(*l*) *Countess of Plymouth* v. *Throgmorton*, 1 Salk. 65; see *Elderton* v. *Emmens*, 6 C. B. 160.

his service, the plaintiff showed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded 75*l.* for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent, that it being one consideration and one debt, it could not be divided: and the Court of Queen's Bench were of that opinion, and reversed the judgment.

Where there is a custom to that effect, servant entitled to wages for actual service.

So where contract not for an entire year.

Where, however, there is a custom applicable to persons in the situation in which the servant was, as there is with regard to domestic servants, who are generally considered entitled to wages for the time they serve, though they do not continue in the service during the whole year, the servant would probably be held entitled to recover wages for the period of actual service (*m*). And it is conceived that in all cases where the contract is not an entire contract for a whole year's service on one side, and a whole year's pay on the other, a servant, whose master dies in the middle of a year, might recover, in the common action for wages, his wages for the broken period of service, upon principles similar to those which allow a servant, wrongfully discharged, to treat the contract as rescinded, and sue for his wages for the period of actual service (*n*).

The Apportionment Act, 4 & 5 Will. 4, c. 22, would not in general apply to cases of hiring and service (*o*).

The executors or administrators of their master are the persons to whom servants must look for payment of their wages, after his decease.

Query, whether wages entitled to preference over other debts.

It is stated by some authorities (*p*), that the wages of domestic servants and of labourers are entitled to preference over other debts of the deceased. But it is difficult to point out any legal ground on which such preference can be claimed in England (*q*), though they are entitled to priority in France (*r*).

Legacies to servants.

The subject of legacies to servants, showing how far such legacies operate to extinguish the servant's claim to wages, will be treated of hereafter in a separate Chapter (*s*).

(*m*) See *Cutter* v. *Powell*, *post*, p. 129.

(*n*) *Ante*, p. 108.

(*o*) *Lowndes* v. *Earl of Stamford*, 18 Q. B. 425.

(*p*) 2 Bl. Comm. 511, citing 1 Roll. Abr. 927; and see Toller on Exors. 286.

(*q*) 2 Wms. Exors. 822, note (*s*), 3rd edit. It may be here mentioned as a caution to servants, that upon the death of their master the only persons entitled to deal with his personal property are his *legal* personal representatives, that is, his executors if he has left any; or, if not, his administrators: and that in a case where a housekeeper, on her master's death, without leaving any executors, applied certain cash in the house, and the produce of the sale of some of her master's property, to the payment of the expenses of his funeral and other expenses, without any authority to do so; she was afterwards held liable to an action at the suit of the widow and administratrix for the money so received and applied, *Welchman* v. *Sturgis*, 13 Q. B. 552.

(*r*) Code Civ. liv. iii. tit. xviii. s. 1. 2101.

(*s*) See the last Chapter in the Book.

Where a farm servant left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest, and the master died, having by his will given all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts, it was held, in a suit for the administration of his estate in Chancery, that the Statute of Limitations did not operate as a bar to arrears of interest upon the sum left by the servant in his master's hands (*t*). Wages left in master's hands: interest.

DEFAULT OF SERVANT.

When a servant, whose wages are due *periodically*, refuses to perform his part of the contract, and serve his master in the manner contracted for, or so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid *any* wages for that portion of time during which he has served since the last periodical payment of wages (*u*). That is to say, if a servant whose wages are only due yearly abscond from his master, or is *rightfully* discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring. In any of such cases, if the servant fail to perform his part of the contract, or be rightfully discharged at any intervening period between the days when his wages are due (*x*), he can recover nothing for the broken period of service. This is upon the principle that the contract was an entire contract, and the performance of the service for the *whole* time agreed upon, was in the nature of a condition *precedent* to the right to recover *any* wages. And it is a general rule (*y*), applicable to all contracts, that, while a special contract remains unperformed, the party whose part is unperformed cannot sue in *indebitatus assumpsit* for compensation for what he has done under the contract until the whole is completed (*z*). Servant making default or rightfully discharged entitled to no wages.

Thus, in an action (*a*) for wages for work performed by the plaintiff, who was a seaman on board the defendant's ship during a voyage from Altona to London, where it appeared that the service was under an agreement, by which the plaintiff agreed to serve from Altona to London *and back again*, and there was an express stipulation, by which the plaintiff was bound to demand no wages till the conclusion of the voyage, the plaintiff was nonsuited on the ground that the contract *Hulle* v. *Heightman*.

(*t*) *Blower* v. *Blower*, 28 L. J., Ch. 181.

(*u*) See Dalt. Just. ch. 58, p. 129, where it is said, "If a servant of his own accord shall depart from his master before his time expired, he shall lose all his wages."

(*x*) See the preceding Chapter as to what cause will justify the discharge of a servant.

(*y*) See cases cited in 2 Smith's L. C. 10, note to *Cutter* v. *Powell*.

(*z*) And he cannot sue the other party specially for non-performance of the contract, unless he has himself performed, or been ready to perform, his part of it: as has been already shown whilst treating of the action for wrongful dismissal.

(*a*) *Hulle* v. *Heightman*, 2 East, 145; and see 2 Smith's L. C. 11.

remained unperformed and unrescinded, and the plaintiff should have sued the defendant upon the contract, and the nonsuit was held right by the Court of King's Bench.

Upon similar principles, in a variety of cases, servants who have been *rightfully* discharged, and have afterwards sued their late masters for wages, have failed to recover anything.

Spain v. *Arnott.*

Thus, in an action (*b*) brought by a *yearly servant* to a farmer, to recover wages for his service from Michaelmas to July, when he was discharged under circumstances which were held to justify his discharge, it was held that he could not recover anything. And Lord Ellenborough said, "If the contract be for a year's service, the year must be completed before the servant is entitled to be paid." Lord Tenterden afterwards, on two occasions (*c*), expressed a similar opinion. And, upon the authority of these cases (*d*), Lord Denman nonsuited a servant who, having been properly discharged (as was admitted), afterwards brought an action for wages during a broken period of service, and the nonsuit was held right by the Court of King's Bench (*e*). The principle on which these cases were decided, was afterwards (*f*) applied to the case of a clerk to a public company, whose salary had been paid *quarterly*, and who, having been discharged for improper conduct some little time after the quarter-day, was held not to be entitled to recover anything for the period which had elapsed since the last periodical payment of his salary. In his judgment, in that case, Lord Denman said, "*Turner* v. *Robinson*, and many other cases, have shown that if a party hired for a certain time, so conduct himself that he cannot give the consideration for his salary, he shall forfeit the current salary even for the time during which he has served."

Turner v. *Robinson.*

Ridgway v. *Hungerford Market Company.*

Lilley v. *Elwin.*

And in the case of *Lilley* v. *Elwin* (*g*), which was an action by a waggoner and servant in husbandry (who left his work and was afterwards summoned before a magistrate under the statute 4 Geo. 4, c. 34, s. 3, and by him discharged from the service,) against his master, it was held that he could not recover wages for the time of his actual service, as he was bound to give a whole year's service before earning any wages, and broke his contract by leaving the service before the year's end.

Servants enlisting as soldiers.

By the Annual Mutiny Act (*h*), it is enacted, that no soldier, &c., shall be liable to be taken out of her Majesty's service for breach of any contract, &c., "or for having left or deserted his employer or master, or his contract work or labour, except in the case of an apprentice or indentured labourer." And by section 63, it is provided, "That it shall be lawful for the justice, before whom any recruit shall be attested, before the expiration of the term of service for which he had been hired by his master, to adjudge to such recruit a reasonable proportion of

(*b*) *Spain* v. *Arnott*, 2 Stark. 236; and see *Robinson* v. *Hindman*, 3 Esp. 235.

(*c*) *Huttman* v. *Boulnois*, 2 C. & P. 510; *Atkin* v. *Acton*, 4 C. & P. 208.

(*d*) In *Turner* v. *Robinson*, 6 C. & P. 15.

(*e*) 5 B. & Ad. 789.

(*f*) *Ridgway* v. *Hungerford Market Company*, 3 A. & E. 171.

(*g*) 11 Q. B. 742.

(*h*) 22 Vict. c. 4, s. 52.

his wages for the time he has actually served: and the said justice shall make an order for the payment of the amount so awarded, and, in case of neglect or refusal to pay the same within four days, shall issue his warrant for levying the same by distress and sale of the goods and chattels of the master."

There is a similar provision in the Annual Marine Mutiny Act (*i*). Sailors.

A master, therefore, whose servant leaves him and goes into the army or navy, must pay him his wages up to the day of his leaving his service.

DEATH OF SERVANT.

Where the death of the servant prevents his performing his part of the contract, and completing the period of service agreed upon, his representatives can recover nothing for the broken period of service, unless there exist a *custom* in the particular occupation in which the servant was engaged, to support the claim to wages for such service, as is the case with regard to domestic servants, or the master of a ship who is not a seaman within the rule of the common law, that freight is the mother of wages (*k*). Wages.

Thus where P., being at Jamaica, subscribed and delivered to C. the following note:—"Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool." C. went on board and did his duty from 31st July to 20th September, when he died before the ship reached Liverpool. His representative brought an action for his wages for the period during which he had served, but it was held that, C. not having completed the voyage, his representative could not recover any wages. And Ashhurst, J., said:—"Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question; the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and he did not perform it, his representative is not entitled to recover." And Lawrence, J., added:—"With regard to the common case of an hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the *Cutter* v. *Powell*.

(*i*) 22 Vict. c. 5, s. 67.

(*k*) *Hawkins* v. *Twizell*, 5 E. & B. 883. That rule is altered now, and seamen's wages are not dependent on the earning of freight, 17 & 18 Vict. c. 104, s. 183.

(*l*) *Cutter* v. *Powell*, 6 T. R. 320; 2 Smith's L. C. 1; see also the case of *Hollingworth* v. *Palmer*, 4 Exc. 267, where a similar question arose, but it became necessary to decide it. The seaman, or his representative, under similar circumstances now would recover wages, 17 & 18 Vict. c. 104, ss. 184, 185, &c.

subject that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether upon the terms of the contract itself, she cannot recover anything" (*m*).

OF THE MASTER'S DUTY TO SUPPLY FOOD AND MEDICINE TO THE SERVANT.—STAT. 14 & 15 VICT. c. 11.

Food. Formerly omission to supply food was merely breach of contract.

The duty of a master or mistress to supply food and other necessaries to their servants, arises solely from a contract either express or implied on their part to do so. And the omission to perform this duty was formerly merely a breach of contract, for which they were civilly, but not criminally, liable, except in the case of a servant of tender years (*n*). But at a meeting of all the judges (except Lord Kenyon and Rooke, J.), held 25th February, 1802, the general opinion was, that it was an indictable offence as a misdemeanor to refuse or neglect to provide sufficient food, bedding, &c., *to any infant of tender years unable to provide for and take care of itself* (whether such infant were child, apprentice or servant), *whom a man was obliged by duty or contract to provide for*, so as thereby to injure its health (*o*).

Except in case of servant of tender years.

R. v. *Saunders.*

A married woman, however, cannot be convicted of a misdemeanor in neglecting to supply even an infant servant with proper food, unless it be shown that her husband supplied her with food to give the child, and she wilfully neglected to give it. The omission to provide food is the omission of the husband, the wife being in the nature of a servant to the husband (*p*).

Sloanes' case.

In the case of the Sloanes, who were indicted in February, 1851, upon a charge of starving and otherwise ill-treating their servant girl, who was sixteen years old, the learned judges (*q*) who tried the case considering that she was not of *tender years*, that part of the charge was abandoned (*r*).

14 & 15 Vict. c. 11.

In consequence of the great scandal caused by the Sloanes' case, the statute 14 & 15 Vict. c. 11 was passed. By sect. 1 of that statute, it is enacted, "That where the master or mistress

Persons refusing or neglecting to

of any person shall be legally liable to provide for such person

(*m*) In *Bray* v. *Finch*, 26 L. J., Exc. 91, which was an action by the administrator of a person who had been many years servant to the keeper of a private lunatic asylum, and left his wages in his master's hands, the court refused an order for the production of defendant's books, under sect. 50 of the Common Law Procedure Act, 1854.

(*n*) *R.* v. *Ridley*, 2 Camp. 650.

(*o*) See *Friend's Case*, Russ. & Ry. C. C. 22.

(*p*) *R.* v. *Saunders*, 7 C. & P. 277.

(*q*) Coleridge and Cresswell, JJ.

(*r*) The defendants pleaded guilty to the charge of assaulting, &c., the servant, and were punished for *that*.

as an apprentice, or as a servant, necessary food, clothing, or lodging, and shall wilfully and without lawful excuse, refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person, whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years."

supply necessary food to apprentices or servants, or unlawfully assaulting them, guilty of a misdemeanor.

And by sect. 2, the costs of prosecution in any such case may be allowed by the court before which the indictment shall be tried, to be paid by the treasurer of the county, as in cases under 7 Geo. 4, c. 64 (*s*).

Costs of prosecution.

A master is legally bound to provide medical attendance for an apprentice (*t*), but not for a servant, in case of illness or accident (*u*). Lord Kenyon, indeed, was of opinion (*x*), (and it was said by Lord Alvanley (*y*), that he had reason to believe that that was not a hasty opinion, but formed upon reflection,) that a master was obliged to provide for his servant in sickness and in health; and that he, therefore, was liable for medicines furnished to his servant while in his service. Not that his servant was at liberty to go abroad and contract debts for medicines, but that *whilst he was under his master's roof* the master was under a legal as well as a moral obligation to provide the necessary medicines, and to pay for such as were administered to his servant under such circumstances. And Lord Eldon (*z*) seemed disposed to follow Lord Kenyon's opinion. But subsequent decisions have laid down a different doctrine, and it may now be considered as established law that a master is *not bound* to provide medical advice for his servants, and that it makes no difference whether or not the servant be living under his master's roof. The first formal decisions upon this point was made in the case of *Wennall* v. *Adney* (*a*), which was an action by a surgeon to recover the amount of his bill for medical attendance upon a servant of the defendant, who had his arm broken while driving the defendant's team, and who had been hired by the defendant at the yearly wages of 3*l.* 10*s.*

Medicine. Master is not bound to provide medical attendance for servants.

Wennall v. *Adney.*

(*s*) The act also provides in the subsequent sections for the keeping of a register and periodical visitation, by the guardians or overseers, of all young persons hired or apprenticed from any workhouse or union. See the act printed at length in the Appendix.

(*t*) *R.* v. *Smith*, 8 C. & P. 153.

(*u*) The case of seamen on board a ship is peculiar, and is provided for by statute 17 & 18 Vict. c. 104, s. 234. See *Couch* v. *Steel*, 3 E. & B. 402.

(*x*) *Scarman* v. *Castell*, 1 Esp. 270.

(*y*) In *Wennall* v. *Adney*, 3 B. & P. 252.

(*z*) *Simmons* v. *Wilmott*, 3 Esp. 93.

(*a*) 3 B. & P. 247. Lord Mansfield had indeed at *Nisi Prius* held that a master was not legally bound to repay the parish for the cure of his servant, *Newby* v. *Wiltshire*, 2 Esp. 739; *S. C.* 4 Doug. 284. But the case in the text is the first decision *in banc.* upon the subject.

and victuals. The defendant had made no express promise to pay the plaintiff, and it was held that there was no implied promise on his part to do so; and therefore the plaintiff was nonsuited, and the nonsuit was afterwards held right by the Court of Common Pleas. In giving judgment, Lord Alvanley, C. J., after stating his concurrence with the learned Judge who tried the case, in thinking the defendant not liable, said that, "previous to the case of *Searman* v. *Castell*, there is no authority in the law of England to be found which warrants the position contended for on the part of the plaintiff. I have no doubt whatever that *parish officers* are bound to assist where such accidents as these take place: and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance which the necessity of the case usually requires to recover against them the amount of money expended." And Heath, J., observed: "I believe that the humanity of Lord Kenyon misled him when he adopted the doctrine upon which he decided the case of *Searman* v. *Castell*. Probably, at the moment, it occurred to him that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute: but I am perfectly sure *it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters*, for the situation of many masters who are obliged to keep servants is not such as to enable them to afford sufficient assistance in cases of serious illness." And Rooke, J., added, "It must be left to the humanity of every master to decide whether he will assist his servant according to his capacity or not."

Parish liable.

Since the case of *Wennall* v. *Adney*, it has never, it is believed, been seriously contended that any legal liability exists on the part of the master to supply medical assistance for his servants, but in the few cases which have happened at Nisi Prius it has usually been contended, on the part of the plaintiff, that the master has by his conduct rendered himself liable, either by calling in his own usual medical attendant, or by recognising the employment of the medical man called in by the servant. Therefore (*b*), in an action for the amount of a surgeon's bill, which contained a charge of 7*s.* 6*d.* for attending a servant of the defendant named Read, who had hurt her ancle in getting over a gate; and also a charge of 12*l.* for attending one Parry, who had acted as wet-nurse to two of the defendant's children; the defendant was held *not* liable to pay the former charge, as the plaintiff was not the regular medical attendant of the family, and had been employed by Read without the knowledge of her master or mistress. But the latter charge the defendant was held *liable* to pay: as it appeared that Parry's illness arose from suckling the defendant's youngest child, and his wife knew of the plaintiff's attendance but did not express any disapprobation of it; although it also appeared that the defendant did not know the plaintiff, and had sent the surgeon

Master may render himself liable by his conduct.

Cooper v. *Phillips*.

(*b*) *Cooper* v. *Phillips*, 4 C. & P. 581: and see *Sellen* v. *Norman*, 4 C. & P. 80.

who regularly attended his family to see Parry, and had also sent her 10*s.* to pay for medicines. Mr. Justice Taunton, considering that his doing so showed that he considered himself liable to take care of her in that illness, and that it must be taken that the wife had the general superintendence of the house.

Query, whether master who has contracted to supply necessary food, is liable to supply medicine in case of illness.

It is believed, however, that no case has yet occurred in which the question has arisen in an action by a *servant* against his master, who had agreed to supply the servant with necessary food, whether the master in *such case* is bound by his contract to furnish physic to the servant in case of illness. But when the question shall arise, the decision of it must depend upon the exact nature of the contract entered into. Sometimes a master engages to supply his servant with necessary victuals, and it may be argued that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as if a servant be in need of wine or victuals of that description which are given by way of medicine (*c*).

Parish liable.

In the event of illness or accident, however, happening to a pauper, the parish in which it takes place is bound to provide the necessary medical advice and assistance (*d*). And an overseer neglecting to provide medical assistance when required to a pauper labouring under dangerous illness is indictable, although such pauper is not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief (*e*).

OF THE MASTER'S DUTY TO INDEMNIFY THE SERVANT FROM THE CONSEQUENCES OF OBEYING HIS ORDERS, AND HEREIN OF THE MASTER'S LIABILITY FOR INJURIES TO SERVANT.

When master is liable to indemnify servant from conse-

It is also the duty of a master to indemnify his servant from the consequences of doing, in obedience to his master's orders, any act pursuant to orders which he was bound to obey; or any other act which was either lawful in itself, or which, not

(*c*) See *per* Lord Alvanley in *Wennall* v. *Adney*, 3 B. & P. 247.

(*d*) *Wennall* v. *Adney*, 3 B. & P. 247; *Simmons* v. *Wilmot*, 3 Esp. 91; and see *Watling* v. *Walters*, 1 C. & P. 132, as to deputy overseer's liability. And the parish cannot recover the expenses from the master, *Newby* v. *Wiltshire*, 2 Esp. 739; *S. C.* 4 Dougl. 284; nor from the parish where the pauper was settled, *Atkins* v. *Banwell*, 2 East, 505; *Gent* v. *Tompkins*, 5 B. & C. 746, note; nor may a pauper, who has met with an accident, be removed to the place of his settlement during his illness, *R.* v. *Bury St. Edmunds*, 10 East, 25; *R.* v. *Ludlow*, 4 B. & Ald. 660; *Tomlinson* v. *Bentall*, 5 B. & C. 738; *Paynter* v. *Williams*, 1 C. & M. 810. But where a servant, having met with an accident, was carried to the nearest house, which was in the next parish, *that* parish was held liable, *Lamb* v. *Bunce*, 4 M. & S. 275, until an order of removal made, *R.* v. *Oldland*, 4 A. & E. 929.

(*e*) *R.* v. *Warren*, Russ. & R. C. C. 48, n.

quences of obeying his commands.

being in itself unlawful, might have been either lawful or unlawful, but which the servant was induced by the conduct of his master to believe to be lawful, as the rule that one wrongdoer cannot sue another for contribution (*f*) would not apply in such cases (*g*).

Thus, if a servant, in obedience to the command of his master, commit a trespass upon the property of another, not knowing that he is doing any injury, he is nevertheless answerable for the tort as well as his master to the party injured, yet he is entitled to an action against his master for the damages he may suffer, although the master also was ignorant that the act committed was unlawful, because he is deemed the principal offender.

In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them, although both parties are wrongdoers (*h*).

When not.

But it is conceived that a master is not bound to indemnify his servant from the consequences of an act which is *malum in se*, or which the servant knew to be unlawful, although done by him in obedience to his master's orders, as the servant was not bound to obey his master's orders in such case; and the master is only bound to indemnify an *innocent* agent. And a master is not bound to indemnify his servant from damage arising in consequence of his acting contrary to his master's orders: as if a servant entrusted to sell, and expressly ordered not to warrant, does warrant, and suffers damage in consequence (*i*).

Not if servant act contrary to orders.

Nor for injuries in ordinary discharge of servant's duty.

And inasmuch as a servant, when he engages to serve a master, impliedly undertakes as between himself and his master to run all the ordinary risks of the service (including the risk of negligence on the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both) the master is not in general bound to indemnify him against the consequences of injuries sustained in the ordinary discharge of the duties for which he was hired;

(*f*) *Merryweather* v. *Nixon*, 8 T. R. 186.

(*g*) *Southern* v. *How*, Bridgman's Rep. 126; *S. C.* Cro. Jac. 468; *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57; *Toplis* v. *Grane*, 5 Bing. N. C. 650; *Collins* v. *Evans*, 5 Q. B. 830; *Rawlings* v. *Bell*, 1 C. B. 951; Smith's Merc. Law, 115; Story on Agency, s. 339. And see also the following cases, in which the question has been whether an action for money paid would lie by a person employed against his employer, *Britain* v. *Lloyd*, 14 M. & W. 762; *Bayliffe* v. *Butterworth*, 1 Exc. 425; *Bayley* v. *Wilkins*, 7 C. B. 886; *Westrop* v. *Solomons*, 8 C. B. 345; *Lewis* v. *Campbell*, *ib.* 541. As to costs see *Garrard* v. *Cottrell*, 10 Q. B. 679.

(*h*) See *Lowell* v. *Boston and Lowell Railroad Corporation*, 23 Pick. 33.

(*i*) See *per* Houghton, J., in *Southern* v. *How*, Cro. Jac. 471; see *Grylls* v. *Davies*, 2 B. & Ad. 516.

that is, at least, if the master provide competent fellow-servants, and tackle and machinery reasonably proper and adapted to the work in hand. This principle has, during the last twenty years, and especially since the first edition of this work was published, been discussed and applied in a great number of cases in England, Scotland, Ireland and America; and as it is one of considerable importance and extensive application, it will be desirable to state some of these cases at greater length than would otherwise have been thought necessary. For although the general principle is settled, and may now be considered to be substantially the same in all the countries just mentioned (*k*), the application of it to the circumstances of particular cases will probably yet give rise to considerable litigation and dispute. And as we shall shortly see, the question who are fellow-workmen, or collaborateurs, as it is sometimes expressed, is still unsettled.

Priestley v. *Fowler*.

The first case in which the question arose, was *Priestley* v. *Fowler* (*l*). The plaintiff in that case was a servant of the defendant in his trade of a butcher, and the defendant desired him to go with certain goods of the defendant, in a van belonging to the defendant, and conducted by another servant. The plaintiff accordingly went, but the van, being overloaded, broke down, and the plaintiff, who was riding on it, was thrown off and his thigh broken. It did not appear whether the defendant *knew* of the defects in, or overloading of, the van; the court, therefore, was not called upon in that case (*m*) to decide how far such knowledge on his part of a defect, unknown to the servant, would make him liable. But, under the circumstances, he was held *not* liable, Lord Abinger, C. B., saying, "If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coachmaker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend

(*k*) There was supposed to be a difference in the law upon this subject in Scotland, prior to *Bartonshill Company* v. *Reid*, in Dom. Proc. *post*, p. 143.

(*l*) 3 M. & W. 1; see *Winterbottom* v. *Wright*, 10 M. & W. 109; *Brown* v. *Mallett*, 5 C. B. 599, 616; *Seymour* v. *Maddox*, 20 L. J., Q. B. 327; *S. C.* 16 Q. B. 326. Upon similar principles it has been held that a guest, who was injured in going through a glass door, could not maintain an action against his host, *Southcote* v. *Stanley*, 25 L. J., Exc. 339; *S. C.* 1 H. & N. 247.

(*m*) See cases *infra* on this point.

to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially which is described in the declaration in this case, the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford. We are, therefore, of opinion that the judgment ought to be arrested."

Farwell v. *The Boston and Worcester Railroad Corporation.*

The next case occurred in America (*n*). Two persons were employed by the defendants in their business, the one as an engineer to manage the engines and cars on the road, the other to manage the switches on the railway. The latter, although

(*n*) *Farwell* v. *The Boston and Worcester Railroad Corporation*, 4 Metc. Rep. 49; see Story on Ag. 453 e, note 1. The judgment is also printed in 3 M'Q. 316. This case has been frequently acted upon in America. See *Brown* v. *Maxwell*, 6 Hill's Rep. 592 (1844); *Coon* v. *Syracuse and Utica Railroad Company*, 6 Barbour's Rep. 231 (1849); *Hayes* v. *Western Railroad Corporation*, 3 Cush. Rep. 270; *Albro* v. *Agawam Canal Company*, 6 Cush. Rep. 75 (1850); *King* v. *Boston and Worcester Railroad Corporation*, 9 Cush. Rep. 112 (1851); *Gillshannon* v. *Stony Brook Railroad Corporation*, 10 Cush. Rep. 228 (1852). See also the Scotch case of *M'Naughton* v. *The Caledonian Railway Company*, 19 Sec. Ser. 271; 3 M'Q. 311; also reported 28 Law T. 376; 21 Sec. Ser. 160.

he was properly selected by the company as a person of due skill and reasonable diligence, negligently put or left a switch across the railway, whereby the engine and cars were thrown off the line, and the engineer was severely injured. He brought an action for the injury sustained against the company, but it was held, upon full argument, that the action was not maintainable, but should have been brought against the wrongdoer himself (*o*). Shaw, C. J., in delivering judgment, went into an elaborate examination of the whole subject, and among other authorities cited, with approval, the case of *Priestley* v. *Fowler*.

Hutchinson v. The York, Newcastle and Berwick Railway Company.

The next case in England was *Hutchinson* v. *The York, Newcastle and Berwick Railway Company* (*p*). The nature of the case sufficiently appears from the judgment of Alderson, B., who said, "The question is whether the defendants are liable for the injury occasioned to one of their own servants by a collision while he was travelling in one of their carriages in discharge of his duty as their servant; in respect of which injury they would undoubtedly have been liable if the party injured had been a stranger travelling as a passenger for hire. We think that they are not. This case appears to us to be undistinguishable in principle from that of *Priestley* v. *Fowler*." His lordship then proceeded to state that case; to explain the principle upon which a master is in general liable for accidents resulting from the negligence or unskilfulness of his servant, and to show that a servant could not recover against his master for injury sustained in consequence of his own unskilfulness or negligence. He then continued—"The difficulty is as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market; it is admitted if, by the unskilfulness of A., a stranger is injured, the master is responsible; not so if A., by his unskilfulness, hurts himself; he cannot treat that as the want of skill of his master (*q*). Suppose, then, that by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service; there, we think, B. has no claim against the master; they have both engaged in a com-

(*o*) But it has since been held in America that the fellow-servant is not responsible to the sufferer under such circumstances, *Albro* v. *Jaquith*, 4 Gray, 99, *post*, p. 152. Pollock, C. B., laid down similar law in *Southcote* v. *Stanley*, 1 H. & N. 250.

(*p*) 5 Exc. 343; *S. C.* 19 L. J., Exc. 296. This case, it will be observed, is similar to the American case last cited in the text, which happened previously; but as none of the American cases were cited in it, the judgment is of more value, as showing the concurrent opinion of Judges of both countries, unbiassed by each other. See also *M'Eniry* v. *Waterford and Kilkenny Railway Company*, 8 Ir. C. L. R. 312.

(*q*) *Semble*, the non-liability of master in that case would proceed from the principle of avoiding circuity of action; as the servant himself would be liable over again to his master. An objection which would not apply to holding a master responsible to one servant for the tortious acts of another.

mon service, the duties of which impose a certain risk upon each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his fellow-servant also, and he must be supposed to have contracted on the terms that as between himself and master he would run that risk. Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. H., the deceased (*r*), in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which H. must be taken to have agreed to run when he entered into the defendant's service, and for the consequences of which therefore they are not responsible. The declaration indeed states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which the deceased was travelling, and other of their servants who were managing the train with which the plaintiff's carriage came into collision; and it was argued that this allegation is divisible, and in order to sustain the declaration it would not be necessary to prove any negligence on the part of the train in which H. was travelling; but it would be sufficient to prove negligence on the part of the other train, and so it was contended that even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages of which H. was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with H. servants of the defendants, were not at the time of the accident engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. *The principle is, that a servant when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both.* The death of H. appears on these pleadings to have happened while he was acting in the discharge of his duty to the defendants as his masters, and to have been the result of carelessness on the part of one or more other servant or servants of the same masters while engaged in their service. And whether the death resulted from mismanagement of the one train or of the other, or of both, does not affect the principle; in any case it arose from carelessness or want of skill, the risk of which the deceased had as between himself and the defendants agreed to run. It may, however, be proper, with reference to this point to add, that *we do not think a master is exempt*

(*r*) The action was brought by his administratrix, under the statute 9 & 10 Vict. c. 93.

from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury acting in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant. It was contended that the plea in this case (*s*) is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration; but this objection is unfounded. Though we have said that a master is not responsible generally to one servant for any injury caused to him by the negligence of a fellow-servant while acting in one common service, yet this must be taken with the qualification that the *master shall have taken care not to expose his servants to unreasonable risk.* The servant when he engages to run the risk of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from risk by associating him only with persons of ordinary skill and care; and the real object of the plea in this case is, to show that the defendants had discharged a duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shown no ground of action, and so our judgment must be for the defendants."

Wigmore v. *Jay.*

Upon similar principles it was afterwards held, in *Wigmore* v. *Joy* (*t*), that a master builder was not liable to an action at the suit of the administratrix (*u*) of a bricklayer who was killed by reason of the falling of the scaffold on which he was working. The scaffold was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by the men in the employ of the defendant, the deceased not being one of them; and the falling of the scaffold was caused by the unsoundness of one of the ledgers or horizontal poles employed in its construction.

Albro v. *Agawam Canal Company.*

The following case shortly afterwards occurred in America (*v*), and is not unlikely to be useful in England. The defendants were large manufacturers of cotton goods, and the plaintiff was a spinner in their employ. J. was their superintendent, having a general supervision and charge of their establishment, and of the manufacture there carried on. The treasurer of the corporation was their general financial agent. Subordinate to the superintendent were the overseers of rooms in the factory, who were hired and discharged by the superintendent, usually

(*s*) The plea, in substance, was that the collision took place solely by the negligence, &c. of the defendant's servants, who were severally fit and competent persons.

(*t*) 5 Exc. 354; *S. C.* 19 L. J., Exc. 300; and see *Seymour* v. *Maddox*, 16 Q. B. 326; *S. C.* 20 L. J., Q. B. 327, where it was held that the manager of a theatre was not liable to an action at the suit of a singer for injuries sustained by him in falling through a hole in the stage.

(*u*) This action was also brought under the statute 9 & 10 Vict. c. 93.

(*v*) *Albro* v. *Agawam Canal Company*, 6 Cush. 75 (1850).

with the advice of the treasurer. The overseers of the rooms hired and discharged the operatives employed in their respective rooms, and all these officers and operatives were paid for their services by the defendants' paymaster at the counting-room. The plaintiff was injured through the negligence of J., in directing the person employed in the manufacture of the gas, with which the mill was lighted, to throw off all the weights from the gasometer, whereby the gas was forced into the mill where the plaintiff worked, in great quantities, extinguished the lights, and so filling the room where plaintiff was, as to throw her into spasmodic fits, and occasion her serious and lasting injury. But it was held, upon the authority of *Priestley* v. *Fowler*, *Farwell* v. *The Boston and Worcester Railroad Corporation*, *Hutchinson* v. *The York, &c., Railway Company*, and *Wigmore* v. *Jay* (*x*), that the plaintiff could not recover, as the accident occurred through the negligence of J., who was a fellow-servant of the plaintiff (*y*). And Fletcher, J., said, "It cannot affect the principle, that the duties of the superintendent may be different, and, perhaps, may be considered as of a somewhat higher character than those of the plaintiff, inasmuch as they are both the servants of the same master, have the same employer, are engaged in the accomplishment of the same general object, are acting in one common service, and derive their compensation from the same source. The plaintiff and the superintendent must be considered as fellow-servants within the principle and meaning of the cases above referred to." The court, however, expressed an opinion that it would have been otherwise had J. been an unfit person, of which there was no suggestion.

Shipowner not liable to seaman if ship unseaworthy.

Couch v. *Steel.*

Upon somewhat similar principles, it was held, in a case in England (*z*), in which the declaration disclosed nothing more than that the plaintiff had embarked as a seaman on the defendant's vessel; that the vessel was not seaworthy but leaky, in consequence of which the plaintiff became wet and ill; that this disclosed no contract or legal duty of which there had been a breach the subject of an action. And Lord Campbell said, "For aught that appears on this count, the defendant may have been perfectly ignorant of the defects in the vessel, whilst the plaintiff may have examined the vessel before he engaged himself, and have known her state well. Or it may be that both parties were aware of it, and that it was their intention that the seaman should work and fare the harder and have that consideration in his wages. There being no allegation of a *scienter*, if we held the defendant liable on this count, we must hold a shipowner always liable to an action from every seaman, if from any accident, a butt having started or the like, the ship was not seaworthy. *No such action has ever been brought*; this is a case of the first impression, in support of which neither a decision nor even a dictum has been brought to our notice, nor has

(*x*) See these cases, *supra*.

(*y*) It was afterwards held upon the same principles that J. was not liable, *Albro* v. *Jaquith*, 4 Gray's Rep. 99, *post*, p. 152.

(*z*) *Couch* v. *Steel*, 3 E. & B. 402; 23 L. J., Q. B. 121.

any legal principle been urged in its support." And afterwards added, "that *Priestley* v. *Fowler* (*a*) seemed to be in principle the same case as this, and to establish that there is no implied contract with the seamen that the vessel is seaworthy." And Coleridge, J., said, "This is in truth a contract between master and servant, and is to be decided on the principles applicable to that relation."

Head contractor not liable to sub-contractor's workmen. *Wiggett* v. *Fox*.

Similar principles are applicable to workmen of several sub-contractors. If, for instance, a builder who agrees to erect a house, makes separate contracts with other persons to complete certain portions of the work, as, for instance, with a bricklayer, a carpenter and plumber, the persons employed by the latter are the servants of the builder, working together for one common object. Where, therefore (*b*), a workman, employed under a sub-contractor at the Crystal Palace to do work there, was killed by the negligence or carelessness of another workman engaged in doing business for the defendants, who were the general contractors for the whole, under whom the sub-contractor, whose servant the deceased was, had been engaged to perform a definite portion of the whole contract; it was held that the defendant was not liable to an action at the suit of his administratrix, under Lord Campbell's Act, 9 & 10 Vict. c. 93. And Alderson, B., said:—"The true principle is in our opinion to be found in *Hutchinson* v. *The Newcastle, &c. Railway* (*c*). We think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose. We should not give full or reasonable effect to the principle which governs such cases (and which, as stated in *Priestley* v. *Fowler*, mainly arose from the enormous inconveniences which would ensue from holding the common employer to be liable in such circumstances), if we were not to extend it as far as the present question."

Volunteer assisting servants. *Degg* v. *Midland Railway Company*.

And the principle has been extended to prevent a volunteer recovering under similar circumstances (*d*).

This was also an action by an administratrix, under Lord Campbell's Act (*e*). The deceased was a clerk in the employ of Messrs. Pickford, the carriers. On the day on which he met with his death he was occupied in the goods shed adjoining the C. station of the defendants' railway in loading goods for his employers. Three porters of the defendants were trying to turn a truck on a turntable in a siding, and the deceased, seeing that their strength was not sufficient for the purpose, called out that he would assist them, left his work and went on to the siding. While in the act of moving the turntable an engine of the defendants, which was employed in moving trucks, was set in motion and backed down the siding, and the trucks attached to it came in contact with the truck on the turntable, and the

(*a*) 3 M. & W. 1, *ante*, p. 135.
(*b*) *Wiggett* v. *Fox*, 11 Exc. 832.
(*c*) 5 Exc. 343, *supra*, p. 137.
(*d*) *Degg* v. *The Midland Railway Company*, 26 L. J., Exc. 171; *S. C.* 1 H. & N. 773.
(*e*) 9 & 10 Vict. c. 93.

deceased being forced against a wall, received injuries of which he died. The defendants' servants were persons competent to do the work, and the defendants did not authorize the negligence, and it was therefore held that the action was not maintainable. In giving judgment for the defendants, Bramwell, B., said:—"The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable, and it might be enough for us to say that those cases govern this, for it seems impossible to suppose that the deceased, by volunteering his services, could have any greater rights or impose any greater duties on the defendants than would have existed if he had been a hired servant. But we were pressed by an expression found in the cases, that a servant undertakes as between him and his master to run all ordinary risks of the service, including the negligence of a fellow-servant, *Wiggett* v. *Fox* (*e*) being cited for this purpose; and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other. The consideration may not be so obvious, but it is as competent to a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid for it, he will take care of himself from the negligence of his fellow-workmen as it would be if he were paid for his services. But we were also told that there was and could be no agreement, that Degg was a wrongdoer, and therefore the action was maintainable (*f*). It certainly would be strange that the case should be better if he were a wrongdoer than if he had not been. We are of opinion that this argument cannot be supported."

Servant of one company injured by servant of another on siding in joint occupation, may recover.

Vose v. *Lancashire, &c. Railway Company.*

But where a workman in the employ of one railway company was engaged in repairing their carriages upon a siding belonging to another company, but in the joint occupation of both companies, and he was placed between the carriages, so that he could not see what might be coming, and was necessarily making a noise at his work, so that he could not hear, and an engine belonging to the other company came up into the siding and drove the carriages together, so that he was crushed between them and killed, and the jury found that the company to whom the engine belonged were guilty of negligence by reason that their rails were defective, and that neither the deceased nor his fellow-servants were so; it was held that his representative *might* maintain an action against that company for compensation under Lord Campbell's Act, they not having been his employers (*g*). In giving judgment in that case, Pollock, C. B., said:—"I must say now (I am speaking merely my own personal private opinion) (*h*), I think we

(*e*) 11 Exc. 832, *supra*, p. 141.

(*f*) Upon the principle of *Bird* v. *Holbrook*, 4 Bing. 628, and such cases.

(*g*) *Vose* v. *The Lancashire and Yorkshire Railway Company*, 27 L. J., Exc. 249; *S. C.* 2 H. & N. 728.

(*h*) Watson, B., shortly afterwards expressed the concurrence of the *Court* in this opinion, in *Griffiths* v. *Gidlow*, 27 L. J., Exc. 466.

ought to be extremely cautious how we relax the rule that was laid down in this court originally, but which now is undoubtedly the law of the land, with respect to servants in a common employ suffering by the negligence of each other. I believe there was never a more useful decision, or one of greater practical and social importance in the whole history of the law. I believe it was the law—I thoroughly understood it to be so before attention was called to it; for if it had not been so we could hardly have lived into the present century without having actions brought over and over again. No such action ever had been brought before the time when it was proposed to make a master liable in respect of one servant for the negligence of another. I think we ought to be exceedingly cautious how we allow what I must say I consider to be the important benefits of that decision to be frittered away by nice distinctions, or to be broken in upon by the ingenuity of advocates or by the verdicts even of juries."

Miner injured by negligence of fellow-workmen cannot recover. *Griffiths* v. *Gidlow.*

However, where (*i*) the plaintiff was with other workmen in the employ of the defendant, engaged in sinking a mine, and was at the bottom of the pit, and assisted in filling a tub with water which was drawn up to the top to be emptied, and through something occurring at the top, where his fellow-workmen were employed to empty it, it fell down upon the plaintiff and injured him; it was held that he could not sue the defendant for the injury. In that case there was some evidence that the plaintiff was himself contributory to the accident, as he knew that the hook by which the barrel was attached to the tackle to be drawn up was unsafe, and made no complaint; and moreover the defendant had supplied a proper apparatus which the plaintiff's fellow-workmen neglected to use. There was no evidence that the defendant had given any directions to that effect. It was thought by the Court of Exchequer that to hold the defendant liable would be utterly to fritter away the rule that a master is not responsible for injury caused to one servant by the negligence of another.

Barlonshill Coal Company v. *Reid.*

And a similar decision was arrived at by the House of Lords, in the following case (*k*):—The appellants were the owners of a coalpit, Reid and M'Guire were miners in their service. According to the usual course of working the coals in this pit, the miners were let down into and drawn up from the pit in a cage, which was worked by a rope running over a pulley, fixed by machinery, at a considerable height above the mouth of the pit, and worked by a stationary steam-engine, fixed at a few yards distance from the pit. S. was the engineman employed by the appellants to attend to this engine, and it was his duty to attend to the drawing up and letting down of the cage, so that

(*i*) *Griffiths* v. *Gidlow*, 27 L. J., Exc. 405; *S C.* 3 H. & N. 648; 31 L. T. 300.

(*k*) *Bartonshill Coal Company* v. *Reid*, 3 M'Q. 266; *Same Company* v. *M'Guire*, 3 M'Q. 300. The judgment of Lord Cranworth, L. C., in *Reid's case*, deserves an attentive perusal: he was two years deliberating over it; not that he had any doubt about the nonliability of the master, but from other causes.

the workmen might be moved up and down safely, but he disregarding his duty when the cage was coming up, when two workmen, Reid and M'Guire, were in it, negligently omitted to take the proper means for stopping it at a few feet above the mouth of the pit, where there was a platform on which the men ought to have got out, and allowed it to be carried with great force to the top of the machinery, in consequence of which it was upset, and the men thrown out and killed. It was held by the House of Lords, after a long and elaborate discussion and consideration of all the English and Scotch cases, that the representatives of neither of them could maintain any action against the owners of the coalpit. And that there was no difference, in this respect, between the law of England and Scotland. There appeared to be no doubt but that S. and the miners were engaged in a common work.

Who are fellow-workmen engaged in common object.

Considerable difficulty, however, has arisen, and must hereafter arise, in deciding in particular cases what constitutes servants of the same master, fellow-workmen or *collaborateurs*, as they are sometimes called, within the meaning of the rule laid down in *Priestley* v. *Fowler*, and the cases which have followed it. The cases already cited as instances of the application of the rule afford great assistance in determining this question, and further aid may be derived from the following dicta of judges on the subject:—

"It is not necessary for this purpose," said Lord Cranworth, in *Bartonshill Coal Company* v. *Reid* (*l*), "that the workman causing and the workman sustaining the injury should both be engaged in performing the same or similar acts. The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge and those who hammer it into shape, the engineman who conducts a train and the man who regulates the switches or the signals, are all engaged in common work. And so in this case, the man who lets the miners down into the mine, in order that they may work the coal, and afterwards brings them up, together with the coal which they have dug, is certainly engaged in a common work with the miners themselves. They are all contributing directly to the common object of their common employer in bringing the coal to the surface."

And Lord Chelmsford, in M'Guire's case (*m*), said, "It is necessary in each particular case to ascertain whether the servants are fellow-labourers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence, in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation

(*l*) 3 M'Q. 295, *supra*, p. 143. *Bartonshill Company* v. *M'Guire*, 3 M'Q. 307.
(*m*) *Per* Lord Chelmsford in

to him. There may be some nicety and difficulty in particular cases, in deciding whether a common employment exists, but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at."

Servants of same master engaged in different occupations.

This dictum of Lord Chelmsford agrees with what was said by the Lord Ordinary in *M'Naughton* v. *The Caledonian Railway Company* (*n*). "It may be," said he, "that the two persons, viz. the wrongdoer and the injured, though both at the time servants of one master, are engaged in different operations and in distinct departments of work. A dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman. A painter or slater is engaged at his work on the top of a high ladder placed against the side of a country-house, and is injured by the carelessness of the gardener, who wheels his barrow against the ladder and upsets it. A clerk in a shipping company's office is sent on board a ship belonging to the company with a message to the captain, and he meets with injury by falling through a hatchway which the mate has carelessly left unfastened, though apparently closed. A ploughman is at work on a piece of ground held by a railway company, and adjacent to a railway, and is while in the employment of the company killed by an engine, which, through the rashness or carelessness of the engine-driver, leaps from the line of rails into the field. In such and similar cases it could hardly be contended that the rule laid down in *Priestley* v. *Fowler* would apply."

It has been held in America (*o*) that the brakesman of one train who was injured in consequence of part of a train immediately preceding him becoming detached and rolling back upon his train, through the negligence of the brakesman of the preceding train, could not sue the company whose servants they both were. And also, as we have seen, that the superintendent of a cotton mill, in giving orders as to the mode of lighting the gas, was the fellow-servant of a spinner in the employ of the millowner (*p*).

And in the following case (*q*), which also occurred in America, the master was held not liable upon the same ground.

Labourer employed by railway company allowed to ride to and fro on trucks.

The plaintiff was a common labourer, employed by the defendants in mending the road-bed of their railway at a distance from his residence, and was allowed morning and evening to ride with other labourers on the gravel train of the defendants. This was done by consent of the defendants, no compensation being paid directly or indirectly by labourers for the passage, and the company being under no contract to convey them to and fro. One day a collision took place with a hand-car on the track, through the negligence of those in charge of the

(*n*) 19 Sec. Ser. 273; *S. C. nomine M'Norton* v. *Caledonian Railway Company*, 28 Law Times, 376; 21 Sec. Ser. 160.

(*o*) *Hayes* v. *The Western Railroad Corporation*, 3 Cush. 270.

(*p*) See *Albro* v. *Agawam Canal Company*, *ante*, p. 139.

(*q*) *Gillshannon* v. *Stony Brook Railroad Corporation*, 10 Cush. 228 (1852).

gravel train, and the plaintiff was injured: it was held that the plaintiff could not sue the defendants, although it was contended that he and those through whose negligence the accident occurred were not engaged in any common enterprize. The court, however, thought otherwise, and that it made no difference whether the transport to and fro was part of the contract of service or merely a permissive privilege.

Master not liable if he employ competent servants.

Again, a master cannot be held impliedly to warrant to one servant the competency of his fellow-servants. If he does his best to get competent servants that is all he is bound to do. This was decided in the following case (*r*).

Tarrant v. *Webb*.

The defendant was employed to decorate the Carlton club-house. In order to paint the entrance hall a scaffolding was erected, upon which plaintiff and others were at work. One of the upper poles broke, and the plaintiff fell and was injured. The scaffolding was erected by M., who was employed for that purpose by the defendant, who did not interfere, except that when M. told him the painters said it wanted an additional upright to make it secure, the defendant said that if M. hearkened to the painters he would have nothing else to do. The accident was mainly attributable to the want of that upright, though some ascribed it to an accumulation of boards put on the scaffolding by the workmen themselves. It was held that the defendant would not be liable if the jury should be of opinion that he used every possible care to employ a competent person to erect the scaffolding, and Jervis, C. J., said:—"The master *may* be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons. He is not bound to warrant their competency."

Nor for injuries to servant in use of instruments with the nature of which he is acquainted.

Where an injury happens to a servant while in the actual use of an instrument, engine or machine, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, he cannot recover against his master for such injury, unless the injury arose through the personal negligence of the master. And it is no evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use. Where, therefore, a sugar-refiner's labourer was killed through the fall of sugar-moulds which he was raising by machinery, to which *he* attached it by means of a clip which slipped off, it was held that his administratrix could not maintain an action, under Lord Campbell's Act, against his master, although it appeared that another and safer mode of raising the moulds was usual and had been left off by defendant (*s*).

Dynen v. *Leach*.

Nor where injury caused by default of servant.

And of course a master would not be liable where the injury was caused to the servant by his own negligence. As where a miner engaged in an operation called "stooping" (or cutting away portions of pillars or stoops of coal left in original working

(*r*) *Tarrant* v. *Webb*, 18 C. B. 797; *S. C* 25 L. J., C. P. 261. According to *Skipp* v. *The Eastern Counties Railway Company*, 9 Exc. 223, *post*, p. 149, the master is the proper judge of the number of servants requisite for any particular work.

(*s*) *Dynen* v. *Leach*, 26 L. J., Exc. 221.

to support roof), neglected to use the usual props to secure the roof as he worked, and the roof fell on him (*t*), or a workman in a coalpit was injured by his own haste or carelessness in descending a ladder, which was not proved to be defective (*u*). In such cases as the servant's own negligence materially contributed to his injury, he could have no claim on the master (*x*).

Nor where act of third person proximate cause of injury.

Nor is the master liable where the act of a third person is the proximate cause of the injury. The plaintiff was a labourer employed by the defendant to do work at the building of a house in a street at Liverpool, and there had been a hoarding put up to protect the building from persons and carriages passing. The plaintiff had complained that the hoarding was too narrow, and he had not room to pass with a hod of mortar between it and a crab and cradle that had been erected there. While he was working a vehicle was coming up the street where there was plenty of room and struck the hoarding, in consequence of which he got injured. He then brought an action against his employer, but was nonsuited, as after he had complained he had continued working there voluntarily with full knowledge, and the part which the master had in the injury was too remote (*y*).

Alsop v. *Yates.*

Master liable if he personally interfere.

But if the master personally interfere he may be liable.

The plaintiff was a bricklayer in the service of the defendants, who were builders, and one day, in consequence of the breaking of a putlog, the plaintiff fell from a scaffolding and broke his leg. The defendants had employed a labourer to erect the scaffold, who had complained that some of the poles were rotten, and had broken them and laid them aside. Smith (the defendant) came up and asked who broke them, and told the labourer they would do very well, as there were no bricks or mortar to be put upon them. The labourer used such as he thought sound, and three where one would have done, but one broke; hence the injury. It was held by the Exchequer Chamber (*z*) that there was evidence to go to the jury of the personal interference and negligence of the master, in which case he was liable, and a new trial was granted.

Roberts v. *Smith.*

Master bound to have machinery in order.

And where a master employs his servants in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect them against unnecessary risks (*a*).

(*t*) *Cook* v. *Bell*, 20 Sec. Ser. (Scotch Rep.) 137.

(*u*) *O'Neill* v. *Wilson*, 20 Sec. Ser. 427.

(*x*) See *Senior* v. *Ward*, 28 L. L., Q. B. 139, *post;* and see also *Butterfield* v. *Forrester*, *Bridge* v. *Grand Junction Railway Company*, and cases of that sort, *post.*

(*y*) *Alsop* v. *Yates*, 27 L. J., Exc. 156; *S. C. nom. Assop* v. *Yates*, 2 H. & N. 768.

(*z*) *Roberts* v. *Smith*, 2 H. & N. 213; *S. C.* 26 L. J., Exc. 319; and see *per* Pollock, C. B., in *Vose* v. *The Lancashire and Yorkshire Railway Company*, 27 L. J., Exc. 251. See also *Griffiths* v. *Gidlow*, 27 L. J., Exc. 405; *Cook* v. *Duncan*, 20 Sec. Ser. (Scotch Rep.) 180; *Ormond* v. *Holland*, 1 E. B. & E. 102.

(*a*) *Per* Lord Cranworth, in *Bartonshill Coal Company* v. *Reid*, 3 M'Q. 288.

Workmen in stone quarry injured through defective system.

Upon this principle a workman employed in a stone quarry who was injured in blasting, because, owing to a *defective system*, he could not get out of the way quickly enough to avoid injuries when an explosion took place, was held entitled to recover damages against his master (*b*).

Defective crab.

So where an accident occurred in consequence of a rope giving way which had been used to fasten one of the spokes or arms of a crab (*c*).

Defect in construction of railway break.

So where a workman (employed by a railway contractor), whose duty it was to uncouple the waggons, on stepping on to the break for that purpose it slipped down with him, in consequence of there being no block on it, which it was the duty of the contractor to have seen attached, and the workman was injured, the master was held liable as the machinery was insufficient (*d*).

Miner killed by fall of stone.

So also the master was held liable where a workman was killed by the fall of a large stone while he was at work underground, if in the opinion of a jury his death was occasioned by the unsafe state of the roof of the mine, and the negligence or unskilfulness of the owners in having so left it when the workmen were sent to work there. But he would not have been liable if the condition of the mine was known to the workman, so that his death, which arose from working under it, was the consequence of his own rashness, and not of any neglect of the owner (*e*).

Miner killed coming up out of mine. *Brydon* v. *Stewart*.

So where miners employed at piecework in working coal while in the pit, into which they had been let down in the usual manner, remonstrated with the underground agent as to the state of the mine, complaining, among other things, that air was not adequately admitted, and also that their wages were not sufficient, and on his refusing redress they declined to work any longer, and desired to be drawn up again. The agent acceded to this, and one of the men in the course of the ascent was thrown over and killed. The jury found that the death arose from the pit not being in a safe and sufficient state. It was held by the House of Lords that the men had a right to leave their work if they thought fit, and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition, so that the men might be brought up safely, and not having done so were liable for the consequences (*f*).

(*b*) *Sword* v. *Cameron*, 1 Sec. Ser. (Scotch Rep.) 493. See this and the two following cases stated and commented on by Lord Cranworth, in *Bartonshill Coal Company* v. *Reid*, 3 M'Q. 289. See the American case of *Stone* v. *Cheshire Railroad Corporation*, 19 New Hampsh. Rep. 427.

(*c*) *Dixon* v. *Rankin*, 14 Sec. Ser. 420.

(*d*) *Gray* v. *Brassey*, 15 Sec. Ser. 135.

(*e*) *Paterson* v. *Wallace*, 1 M'Q. 748.

(*f*) *Brydon* v. *Stewart*, 2 M'Q. 30. See the *Bartonshill Coal Company* v. *Reid*, 3 M'Q. 296, *ante*, p. 143, where the accident arose from *negligence of fellow-workmen*, and the master was held not liable; and *Griffiths* v. *Gidlow*, 27 L. J., Exc. 405; *S. C.* 3 H. & N. 648, *ante*, p. 143, where the master *did* provide proper apparatus, and was held not liable.

Upon similar principles the defendant would have been held liable in *Senior* v. *Ward* (*g*) had not the deceased's own negligence disentitled the plaintiff, his representative, to recover.

Master liable for *knowingly* ordering servant to use unsafe tackle. *Williams* v. *Clough.*

And if a master order a servant to use machinery, tackle or implements, which he (the master) knows, and the servant does not know to be unsound or unsafe, in that case the master would of course be liable to indemnify the servant, from the consequence of using such insecure apparatus. Thus, where a declaration alleged that the defendant was possessed of a ladder unsafe and unfit for use by any person carrying corn up the same, and the plaintiff was the defendant's servant, yet the defendant *well knowing the premises*, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder, and the plaintiff, in obedience to the order, and believing the ladder to be proper, and *not knowing the contrary*, did carry corn up for the defendant, but by reason of its being unsafe and unfit, fell from it and was injured; it was held, on demurrer, to be sufficient, without an averment that the plaintiff had no notice that the ladder was unsafe (*h*).

But not where danger equally known to both master and servant. *Potts* v. *Plunket.*

Where the cause of injury or mischief is equally known, and palpable to the person employed as to the master, the servant could not then complain of an accident, for it might be said that he went to the work with his eyes open, and he could not be said to have been put to work on a matter of which he was ignorant that there was risk involved. Thus, where the defendant was building a house, and employed no architect. The plaintiff was the house carpenter, and the defendant chose some flags which were to be set by another person as a landing place, under the plaintiff's direction as to the slope of the landing. The plaintiff and the other person went on the landing when partially set; it broke, and the plaintiff was injured, but the defendant was held not liable (*i*).

Servant bound to complain or refuse to work if machinery or staff insufficient. *Skipp* v. *Eastern Counties Railway Company.*

So, where (*k*) it was the duty of the plaintiff, a servant to a railway company, to attach the carriages of the luggage trains to the engine. One day he was thrown under the carriages and severely injured. There was evidence that the company's staff was not sufficient for the performance of this work, but the plaintiff had been employed in this particular service for several months prior to the accident, and had not made any complaint on the subject to the company: it was held, that the company were not liable, *volenti non fit injuria*. It was also said by Lord Wensleydale, that it was not a question for the jury whether the number of servants employed by the company was

(*g*) 28 L. J., Q. B. 139, *post*, p. 150; see also *Caswell* v. *Worth*, 5 E. & B. 849.

(*h*) *Williams* v. *Clough*, 27 L. J., Exc. 325; *S. C.* 3 H. & N. 258; and see *Potts* v. *Plunket*, 33 Law T. 111, *per* Lefroy, C. J.

(*i*) *Potts* v. *Plunket*, in Ireland, 33 Law T. 111.

(*k*) *Skipp* v. *The Eastern Counties Railway Company*, 9 Exc. 223. In America it has been held that the servant was bound to give notice of defects, *Keegan* v. *The Western Railroad Company*, 4 Scld. 175 (1853); *M'Millan* v. *Saratoga and Washington Railroad Company*, 20 Barbour's Rep. 450 (1855).

sufficient for the performance of the work. The company are themselves the proper judges of the number they require for carrying on the business of the line. The plaintiff, it was said, brought the accident upon himself, for if he found that he could not do the work which was set him, he ought to have declined in the first instance, whereas he carried it on for several months and never complained.

Master liable where he has directed young servant to obey orders of superior servant.

O'Byrne v. *Burn*.

Where, however, a master employs boys and girls, or inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy, whom he puts in his place, it may be they are not within the meaning of the rule employed in a common work. They are acting in obedience to the express commands of their employers, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences. A girl, only nine days in defendant's employ in a clay mill, was unaware of the risks from machinery. A., acting under the defendant as manager of the works, put her to remove some waste clay, while the rollers were in motion. A. ought to have done this himself; and it ought not to have been done at all till the movement of the rollers was suspended. The little girl, in attempting to remove the waste clay in obedience to A.'s order, sustained a severe injury from the rollers; for which she brought an action against the master, and he was held liable (*l*).

For breach of statutory rules.

Where the legislature has by statute imposed upon the master a duty for the protection of the servant, the servant may maintain an action against his master for any breach of statutory regulations, whereby he has sustained particular injury. And neither the imposition of penalties by the statute for the benefit of the injured person, nor the provision that such penalties are only to be sued for with the sanction of the Secretary of State, take away the right of the party injured to sue for damages in person. Of this nature are actions against millowners under the Factory Acts for not properly fencing machinery, whereby workpeople get injured (*m*). But even in such cases the master is not liable if the servant by his own negligence or wilful misconduct, (*e.g.*, by setting the machinery in motion,) cause the accident, or could have avoided the injury by the exercise of ordinary care (*n*).

But not then if servant cause accident.

Breach of coliery rules.

Upon this ground the defendant was held not liable in the case of *Senior* v. *Ward* (*o*), in which the facts were these:—

After the passing of the Act for the Inspection of Coal-mines (*p*), special rules were framed and duly approved of for the regulation

(*l*) *O'Byrne* v. *Burn*, 16 Sec. Ser. (Scotch Rep.) 1025. See the commentary on this case in *The Bartonshill Coal Company* v. *Reid*, 3 M'Q. 294. See also *Hardie* v. *Addie*, 20 Sec. Ser. 553.

(*m*) Such as *Coe* v. *Platt*, 6 Exc. 752; 7 Exc. 460, 923; *Caswell* v. *Worth*, 5 E. & B. 849; *Doel* v. *Sheppard*, 5 E. & B. 856; *Schofield* v. *Schunck*, 5 E. & B. 858, note.

(*n*) *Caswell* v. *Worth*, *ubi supra*.

(*o*) 28 L. J., Q. B. 139.

(*p*) 18 & 19 Vict. c. 108.

of the defendant's colliery, and by one of these rules it was provided, that every morning, before the miners were let down the shaft into the mine, the cage, by which they were to descend, should be let down and pulled up again, heavily loaded, to test the sufficiency of the rope and of the tackling. But the defendant, who superintended the working of his colliery, instead of enforcing this rule allowed it to be entirely neglected, and to his knowledge it had been entirely neglected by his workmen for many weeks before the accident happened, which caused the death of the deceased. The night before the accident, the rope, by which the cage was suspended, being then in good condition, was injured by an accidental fire in the colliery. Next morning the deceased and other miners were let down the shaft without any testing of the rope and the tackling. If that testing had taken place, the insufficiency of the rope would have been discovered, and the men would all have been saved. But the rope broke, and the deceased, with several others, was killed on the spot. There was most culpable negligence on the part of the defendant in neglecting the rule and in keeping in his employment a banksman who he knew habitually disregarded it. Looking to these facts *only*, although the banksman was the fellow-servant of the deceased, and both the deceased and he were employed by the defendant in the colliery as fellow-labourers, Lord Campbell said, "He should have held the defendant liable, his negligence having materially contributed to the death of the deceased. But according to the report of the learned judge who tried the cause, it was further in evidence, that gross negligence was to be imputed to the deceased himself, and that this negligence materially contributed to his death. With the exercise of ordinary prudence he would have escaped the danger, and his life would have been saved. He knew the rule for testing the rope and tackling every morning, and he knew that this rule was habitually violated; further, on the morning of the accident he and the other miners were told by the banksman, that they had better examine the ropes before they went down. Nevertheless they disregarded this warning, immediately getting into the cage, the rope broke as it descended, and they were killed."

Senior v. *Ward.*

Master might be liable,

if servant free from blame.

A master, moreover, is not liable to a servant for injuries sustained in the performance of orders which he was not bound to obey; *e. g.*, a servant is not bound to risk his life or limb in obedience to his master's orders, and if he do so, he (the servant) must take the consequences, his master is not liable for them.

Master not liable if servant not bound to obey.

Similar principles would, it is conceived, apply to any case in which a servant sustained injury in the discharge of duties for which he was not hired, or in acting in obedience to orders which he was not bound to obey. If, for instance, a female servant (say a lady's-maid) were ordered to stand outside an upper window and clean it, or to hold a horse, and sustained injury, it is conceived that neither she nor her representative, in case of her death, could maintain any action against her master for such injury.

One servant not liable to another for accident in course of common employment.

It has been said by Pollock, C. B. (*q*), though it is believed that no actual *decision* upon the subject has yet occurred in England, that the rule laid down in *Priestley* v. *Fowler* (*r*) applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant, *neither can one servant maintain an action against another* for negligence whilst engaged in their common employment. When the case shall arise in England, the following decision in America (*s*), upon the subject, will be of use. An action of tort was brought against the superintendent of the cotton and woollen mill of the Agawam Canal Company, to recover damages for injuries sustained by the plaintiff while in the employment of the company, from the escape of gas occasioned by the negligence, carelessness and unskilfulness of the defendant in the management of the apparatus and fixtures used in the mill for the purpose of generating, containing, conducting and burning inflammable gas for the lighting of the mill. The defendant demurred, and it was held that the action could not be sustained, on the ground that the defendant was only responsible to his employer for negligence, &c., in the discharge of his duty. In the course of his judgment, Merrick, J., observed, "Many of the considerations of justice and policy which led to the adoption of the general rule now perfectly well established, that a party who employs several persons in the conduct of some common enterprize or undertaking is not responsible to any one of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal significancy and force when applied to actions brought for like causes by one servant against another. In the latter as in the former case, they are presumed to understand and appreciate the ordinary risk and peril incident to the service in which they are to be employed, and to predicate the compensation they are to receive, in some measure upon the extent of the hazard they assume. The knowledge that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other labourers engaged in the same common work will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus, by increased vigilance, to promote the welfare and safety of all" (*t*).

Albro v. *Jaquith.*

"But a more obvious and decisive objection to the maintenance of such action between these parties is derived from a consideration of the nature of the obligation assumed, and the direct accountability of the servant to his employer for its breach.

(*q*) In *Southcote* v. *Stanley*, 1 H. & N. 250; *S. C.* 25 L. J., Exch. 339 (1856).

(*r*) *Ante*, p. 135.

(*s*) *Albro* v. *Jaquith*, 4 Gray's Rep. (Massach. 1855), 99. A previous action against the company had failed, *Albro* v. *Agawam Canal Company*, *ante*, p. 139.

(*t*) *Farwell* v. *Boston and Worcester Railroad*, 4 Met. 49 (*ante*, p. 136); *King* v. *The Same Railroad*, 9 Cush. 112.

As the duty to exercise a fit and appropriate degree of care and skill results from their express or implied stipulations with each other, the question whether the contract they have entered into has been faithfully performed belongs to the parties who made it, and by whom, therefore, it is to be definitively settled. Their settlement of it, or if they have made it the subject of litigation, the judgment rendered in the suit between them must be final and conclusive. It is in the latter case *res adjudicata*, and the same question of negligence is not open to further inquiry nor to be made again the subject of legal investigation. "By permitting this action," said Lord Abinger, in *Winterbottom* v. *Wright* (*u*), which was not dissimilar to the present, "we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open."

(*u*) 10 M. & W. 115.

CHAPTER V.

THE LIABILITY OF A MASTER TO THIRD PERSONS FOR THE ACTS OF HIS SERVANT.

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IN CASES OF CONTRACT.

Servant can only bind his master as his agent.

THE power which a servant possesses of binding his master by contracts entered into in his name is founded upon or rather is the basis of the general law of principal and agent. It is only upon the ground that a servant is the agent of his master, that a master can in any case be made liable upon contracts entered into by his servant, and the principle on which the liability of the master upon such contracts depends is, that the act of the servant is, in fact, the act of the master; the maxim being, *Qui facit per alium, facit per se* (*a*).

Incapacity of servant to contract on his own behalf, no objection to master's liability.

And since many persons, such as infants and married women, who are incapacitated in general to do acts on their own behalf, which will be absolutely binding upon them, may nevertheless *as agents* for others do acts which will be binding upon the persons for whom they act (*b*); it would be no objection to the liability of a master upon the contract of his servant that the servant was an infant or a married woman (*c*) at the time the contract was entered into,—provided the contract was in other respects binding upon the master.

If contract within scope

But in order that a contract made by a servant may be binding on his master, it must be within the scope of the authority

(*a*) See Bac. Abr. Master and Servant, K. Where a clerk left a bag and papers belonging to his master at an inn, and left without paying his bill; it was held that the innkeeper had a lien on them as against the master, *Snead* v. *Watkins*, 1 C. B., N. S. 267.

(*b*) Co. Litt. 52 (*a*); Bac. Abr. Authority, B.; Story on Agency, ss. 7 and 8, where see the rule of the civil law. See also *Emerson* v. *Blonden*, 1 Esp. 142; *Palethorp* v. *Furnish*, 2 Esp. 511, note; *Prestwick* v. *Marshall*, 7 Bing. 565; *Lindus* v. *Bradwell*, 5 C. B. 583.

(*c*) As to the effect of a contract made by a married woman as agent, after the termination of her authority to act as agent, see *Smout* v. *Ilbery*, 10 M. & W. 1.

entrusted to the servant; since no agent can bind his principal beyond the scope of his authority (*d*). of servant's authority.

It therefore becomes necessary to inquire what is the scope of authority entrusted to a servant with regard to binding his master upon contracts. The answer to this question involves the consideration of several others, for the authority of a servant to contract in his master's name may be given either *expressly* by deed, writing, or word of mouth; *or by implication* from the conduct of the master (*e*). And in either of those cases it may be *general* (*i. e.*, not unqualified, but to act in all cases of a particular nature), or it may be *special*, (*i. e.*, to act in one particular instance) (*f*). Again, in any of the before-mentioned cases the authority given may be either *limited* by precise instructions, or *unlimited* (*g*). What is scope of servant's authority.

Where authority to contract in his master's name is given to a servant by deed or writing, but little difficulty is likely to arise in ascertaining the extent of his authority, except, perhaps, from some ambiguity in the expressions used in the instrument conferring it (*h*). In such cases it is the duty of the court to explain them, and they will be construed strictly (*i*). Letters containing private instructions as to the mode in which the authority given is to be exercised (as distinguished from the instrument conferring the authority), being documents of a less formal kind, will receive in general a more liberal construction. But where a servant intending to act in conformity with his instructions has acted in a manner contrary to his master's intention, the court will, as between him and his master, construe them in a manner favourable to the servant and against the master, if they are capable of such a construction, upon the principle that *verba fortuis accipiuntur contra proferentem* (*k*). Express authority by deed or writing. Letters of instruction.

The effect of express verbal instructions to the servant will be considered hereafter, as it depends upon whether the servant has a general authority to act for his master, or is merely specially employed on one particular occasion. Express verbal authority.

Where a master has *recognized and adopted* a contract entered into in his name by his servant, he will be equally liable upon it, as if he had previously expressly authorized the servant to enter into it, the maxim in such cases being *omnis* Ratification.

(*d*) On this ground it has been held that an acknowledgment signed by a clerk would not bar the Statute of Limitations, *Hyde* v. *Johnson*, 2 Bing. N. C. 776; and see *Bayley* v. *Ashton*, 12 A. & E. 493.

(*e*) F. N. B. 120, G.

(*f*) *Whitehead* v. *Tucket*, 15 East, 408; Paley on Ag. 199.

(*g*) Paley on Ag. 2.

(*h*) Smith's Merc. Law, 4th ed. 116; and see *Attwood* v. *Munnings*, 7 B. & C. 278; *Withington* v. *Herring*, 5 Bing. 442; *Heraud* v. *Leafe*, 5 C. B. 157.

(*i*) *Howard* v. *Baillie*, 2 H. Bl. 618; *Murray* v. *East India Company*, 5 B. & Ald. 211; *Attwood* v. *Munnings*, *ubi supra*; Paley on Ag. 192; and see *Flemyng* v. *Hector*, 2 M. & W 172; *Cockerell* v. *Aucompte*, 26 L. J., C. P. 194; *S. C.* 2 C. B., N. S. 441, where a member of a coal club was held liable for coal ordered by the secretary.

(*k*) Story on Ag. 74, 75.

Bird v. *Brown.*

ratihabitio retrotrahitur et mandato priori æquiparatur (*l*). This doctrine, said Lord Cranworth in *Bird* v. *Brown* (*m*), "is intelligible in principle and easy in its application when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." (*n*).

A master, however, cannot in this manner render himself liable upon a contract made by a servant, unless the servant, at the time he entered into it, assumed to act as his agent (*o*).

Nor can he thus avail himself by adoption of an act done in his name, which, in order to be valid at all, ought to have been valid *at the time it was done*. Such, for instance, as a notice to quit, since such a notice, to be good, must be one that the party to whom it is given may act upon it immediately (*p*). It is conceived, however, that even if such a notice were given, in his master's name, by a servant not authorized to give it, to a tenant from year to year, and the master ratified it, and gave notice to the tenant of such ratification *before the commencement* of the last half of the tenancy, such ratification would render the notice valid (*q*); though that might, perhaps, more properly be called a *fresh notice* to quit given by the master himself.

Must be of entire contract.

Where a master adopts and ratifies a contract made by his servant, he adopts it *in toto*, and cannot adopt part, and repudiate part which he had not previously authorized the servant to agree to: *e. g.*, if a man, not a horsedealer, authorize a servant to sell a horse, and expressly orders him not to warrant or sell the horse upon any condition, yet, if the servant sell the horse upon condition to be returned if not approved of by the purchaser, and the master receive the price, he thereby ratifies

(*l*) Co. Litt. 207 *a*; Story on Ag. s. 239, *et seq.*, where see the rule of the Roman law. which was similar. And see *Saunderson* v. *Griffiths*, 5 B. & C. 909; *Vere* v. *Ashby*, 10 B. & C. 298; *Maclean* v. *Dunn*, 4 Bing. 722; *Fitzgerald* v. *Dressler*, 33 Law Times, 43; *S. C.* 29 L. J., C. P.

(*m*) 4 Exc. 798.

(*n*) There is more difficulty in the application of this doctrine in cases of tort; as to which see *post.*

(*o*) *Wilson* v. *Tumman*, 6 M. & G. 236; 4 Inst. 317; *Walker* v. *Hunter*, 2 C. B. 334; see *Smith* v. *Hull Glass Company*, 11 C. B. 897. It was a maxim of the Canon law, "Ratum quis habere non potest, quod ipsius nomine non est gestum." See note *a* to 6 M. & G. 239.

(*p*) *Doe* v. *Walters*, 10 B. & C. 626; *Doe* v. *Goldwin*, 2 Q. B. 146; and see *per* Lord Wensleydale, in *Buron* v. *Denman*, 2 Exc. 188; Story on Ag. s. 246.

(*q*) See *Bird* v. *Brown*, 4 Exc. 799.

the contract *and the condition;* and, if the horse be returned, is bound to return the money (*r*).

Admission of liability by master.

Where a master has *admitted* his liability upon a contract made by his servant, the weight due to that admission depends on the circumstances under which it was made (*s*). If no other person has been induced by it to alter his condition, the master is not concluded or estopped by it, but may prove it to have been mistaken or untrue (*t*).

Extent of servant's implied authority.

Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that *the authority of a servant is co-extensive with his usual employment, and the scope of his authority is to be measured by the extent of his employment* (*u*). For a master who accredits a servant by employing him must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether he intended to authorize them or not, or even if he expressly though privately forbad them; it being a general rule of law, founded on natural justice, that where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer (*x*).

Master liable when servant *usually buys* for him upon credit and he *usually* pays.

Upon this principle, where a servant usually buys for his master upon credit, and the master is in the habit of paying for goods so purchased, the master is liable to pay for any goods of a similar nature which the servant may obtain upon credit, even though, in a particular instance, the master furnish the servant with money to pay for the goods, and the servant embezzle the money; or even if the servant after he has been discharged pledge his master's credit, unless the party giving credit knew that the servant was discharged (*y*). Thus, where (*z*) the defendant, who was a considerable dealer in iron, and known to the plaintiff as such, though they had never dealt together before, sent a waterman to the plaintiff for iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods but did not pay for them; the defendant was held liable "for the sending him

Hazard v. *Treadwell.*

(*r*) See and consider *Ferguson* v. *Carrington,* 9 B. & C. 59; *Foster* v. *Smith,* 18 C. B. 156; but see *Bosanquet* v. *Foster,* 9 C. & P. 659; *Same* v. *Corser, ib.* 665.

(*s*) *Newton* v. *Beleher,* 12 Q. B. 924.

(*t*) *Newton* v. *Liddiard,* 12 Q. B. 925; see *Heane* v. *Rogers,* 9 B. & C. 577; *Pickard* v. *Sears,* 6 A. & E. 474

(*u*) Smith's Merc. Law, 116; Paley on Ag. 162; and see Poth. on Obl. by Evans, No. 456.

(*x*) *Hern* v. *Nicholls,* 1 Salk. 289; *Baring* v. *Corrie,* 2 B. & Ald. 143. In *Fitzherbert* v. *Mather,* 1 T. R. 16, Buller, J., said, "It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit?"

(*y*) *Nickson* v. *Brohan,* 10 Mod. 109; Anon. 1 Show. 95; *Aischeombe* v. *Hundred of Snelholme,* Holt, 460; —— v. *Harrison,* 12 Mod. 346; *Sir Robert Wayland's Case,* 3 Salk. 234; Anon. 12 Mod. 564; *Boulton* v. *Arlsden,* 3 Salk. 234; *S. C.* 1 Lord Raym. 225.

(*z*) *Hazard* v. *Treadwell,* 1 Str. 506.

upon trust the first time, and paying for the goods was giving him credit so as to charge the defendant upon the second contract" (*a*).

Wayland's Case.

So where (*b*) a master used to give his servant money every Saturday to defray the charges of the foregoing week. The servant kept the money, yet *per* Holt, C. J., "The master is chargeable; for the master, at his peril, ought to take care what servant he employs, and it is more reasonable that he should suffer for the cheats of his servant than strangers or tradesmen."

Rusby v. *Scarlett.*

Again, where (*c*) a gentleman kept a book with his coachman, in which were entered the articles procured by, and the sums advanced to, him; but there did not appear to be any connection between the sums advanced and the demands he was to pay; the gentleman was held liable to pay for hay and straw delivered for the use of his horses, although he had given the coachman money to pay the bills, which he had embezzled.

Summers v. *Solomon.*

So where the defendant, a jeweller, kept a shop in the country, living himself in London, and visiting the country shop once a month to take stock, &c. The country shop was managed by a shopman, A., from whom the plaintiff had for some years been in the habit of receiving orders in the country in the defendant's name, for goods which were sent to the country shop, and afterwards paid for by the defendant. A. absconded, went to London and ordered jewellery there of the plaintiff in the defendant's name, which he carried away with him: it was held that the previous course of dealing justified the plaintiff in assuming that A. had general authority to order goods for the shop on the defendant's credit, and that the defendant was, therefore, liable for the goods obtained by A. in London (*d*).

Giving servant money to pay debt.

And if the master was originally liable for a debt incurred by his servant, he could not discharge himself by merely giving the servant money to pay it (*e*). But if the creditor should so deal with the master as to lead him to believe that the debt was discharged, the creditor might, under such circumstances, be precluded from afterwards suing the master (*f*).

Tradesman

Upon similar principles the owner of a saw mill was held (*g*)

(*a*) See, however, *Todd* v. *Robinson*, Ry. & M. 217; *Gilman* v. *Robinson*, Ry. & M. 226; *S. C.* 1 C. & P. 642. A general agency to order goods could hardly be implied from a single recognized dealing. In most cases it would be a question for a jury whether the defendant *held out* the servant as his agent for the purpose of ordering the goods in question.

(*b*) *Sir R. Wayland's Case*, 3 Salk. 234; and see *Miller* v. *Hamilton*, 5 C. & P. 433.

(*c*) *Rusby* v. *Scarlett*, 5 Esp. 76.

(*d*) *Summers* v. *Solomon*, 26 L. J., Q. B. 301; *S. C.* 7 E. & B. 879. Bramwell, B., does not assent to the law laid down in this case, 3 H. & N. 794.

(*e*) *Heald* v. *Kenworthy*, 10 Exc. 739.

(*f*) *Macfarlane* v. *Giannacopulo*, 3 H. & N. 860.

(*g*) *Richardson* v. *Cartwright*, 1 Carr. & K. 328; see *Thompson* v. *Bell*, 10 Exc. 10, where a joint stock bank was held bound by an act of the manager. See also *Pauling* v. *London and North-Western Railway Company*, 8 Exc. 867.

bound by a contract entered into by his foreman to furnish the plaintiff with a large quantity of Scotch fir staves; "as a foreman employed to conduct a business like that in which the defendant was engaged, must be taken to have a general authority to bind his master by such contracts." And if a person goes to the office of a carrier and asks what a thing will be done for, and he is told by a clerk, or servant, who is transacting the business there that it will be done for a certain sum, the master can charge no more, although he has previously ordered his clerks to charge more (*h*).

bound by contract of foreman.

Winkfield v. *Packington.*

A company established for the manufacture of glass, completely registered under 7 & 8 Vict. c. 110 (*i*), had power under their deed of settlement to appoint a *manager* of their works, &c., to "superintend and transact, under the control of the board of directors, the manufacturing business of the company," and to whom the board of directors were, by another part of the deed, authorized to delegate "such and so many of the powers thereby given to them as would enable him to carry on the said works and manufacturing business in an efficient manner." It was held that the company were liable for goods supplied to them for the purposes of their manufactures upon orders given by such manager, although there was no express delegation of authority (*h*).

Manager of joint stock company.

The principle of presumptive agency on which these cases were decided has been extended to cases in which the person who assumed to act as servant was not really servant, but was considered to have been *held out* as servant by the act of the master.

Presumptive agency extended to stranger in counting-house.

Thus a merchant has been held bound by a payment in the usual course of business to a person found in his counting-house and appearing to be entrusted with the conduct of the business there, though it turned out that the person was never employed by him, and the money never came to his hands; for, said Lord Tenterden, "The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority" (*l*). And so a tender to a person, probably a chief clerk, in the office of an attorney, who refused to accept the amount tendered as insufficient, has been held good: being equivalent to a tender to the attorney himself (*m*).

Payment to such a person in course of business held good.

Tender to person in an attorney's office, probably a clerk, held good.

(*h*) *Winkfield* v. *Packington*, 2 C. & P. 599.

(*i*) This act is now repealed, 19 & 20 Vict. c. 47, s. 107; 20 & 21 Vict. c. 14, s. 23; except as to insurance companies, 20 & 21 Vict. c. 80.

(*k*) *Smith* v. *Hull Glass Company*, 11 C. B. 897; see also *Ex parte Greenwood*, 3 De. G. M. & G. 459; *S. C.* 18 Jurist, 387; *Ernest* v. *Nicholls*, 6 Ho. Lords Cas. 401; *Forbes* v. *Marshall*, 11 Exc. 166, 179; *Re Athenæum Life Assurance Company*, 27 L. J., Ch. 829; *Agar* v. *Same Company*, 3 C. B., N. S. 725; *S. C.* 27 L. J., C. P. 95; *Prince of Wales Assurance Society* v. *Athenæum Assurance Society*, 27 L. J., Q. B. 297.

(*l*) *Barrett* v. *Deere*, Mood. & M. 200; and see *per* Maule, J., in *Smith* v. *Hull Glass Company*, 11 C. B. 928; and in *Mitcheson* v. *Oliver*, 5 E. & B. 439.

(*m*) *Wilmott* v. *Smith*, Mood. & Malk. 238. In *Moffat* v. *Parsons*, 5 Taunt. 307, tender of payment to a servant who, in pursuance of his master's orders, refused to accept it, was held a good tender to the master.

And an attorney has been held liable to refund money and pay the costs of the application where some one in his office extorted an excessive sum for costs, although the matter did not come to his personal cognizance (*n*). And payment to a sheriff's bailiff's assistant has been held good as against the sheriff (*o*).

Implied authority of clerk to endorse bills.

Again, although "it may be admitted that an authority to draw, does not import in itself an authority to endorse, bills, still the evidence of such authority to draw is not to be withheld from the jury, who are to determine on the whole of the evidence whether such authority to endorse exists or not" (*p*). And, therefore, where the defendants' confidential clerk had been accustomed to draw cheques for them, and in one instance, at least, they had authorized him to endorse, and in two other instances had received money obtained by his endorsing in their names, a jury were held warranted in inferring therefrom that the clerk had a general authority to endorse (*q*).

Smith v. *M'Guire.*

And in a case (*r*) in which the defendant was held liable upon a charter-party signed by his brother ("per proc. of" the defendant), whom he had left at Limerick to conduct his business, which consisted in buying up corn for shipment, Pollock, C. B., observed :—"It would be most inconvenient if a person could not go into a shop and purchase an article without first asking the shopman whether he has authority to sell it. It may be that he was merely employed to sweep the shop; but it would be absurd to apply to the general business of life the doctrine as to the necessity of ascertaining whether an agent is acting within the scope of his authority—indeed the business of London could not go on." And he afterwards said: "When the holder of a bill has ascertained that the person who has accepted the bill as agent or by procuration is a clerk in the house, and in the course of his employment has from day to day accepted bills of that sort, that is enough, and he need not ask for his power of attorney or authority, nor whether that particular bill is on account of the firm. When you find him in the house acting and recognized as the agent of the firm, you need not make any further inquiry, and yet it may turn out that he has never accepted a bill without a schedule being laid before him in the morning of all bills that were to be accepted by him on that day. Persons are supposed to carry on their business according to the ordinary arrangement of mankind generally. If a person conducts his business as the defendant did, by an agent who acts in his absence, in my judgment it is a question for the jury whether, according to the ordinary mode in which business is carried on, the reasonable conclusion to be drawn from these circumstances is not that he had authority as a general agent, and, if so, the principal is bound, though it should turn out

(*n*) *Palmer* v. *Evans*, 1 C. B., N. S. 151.

(*o*) *Gregory* v. *Cotterell*, 5 E. & B. 571.

(*p*) *Per* Tindal, C. J., *Prescott* v. *Flinn*, 9 Bing. 22.

(*q*) *Prescott* v. *Flinn, ubi supra*; and see *Barber* v. *Gingell*, 3 Esp. 60; *Llewellyn* v. *Winckworth*, 13 M. & W. 598; *Summers* v. *Solomon*, *supra*, p. 158.

(*r*) *Smith* v. *M'Guire*, 3 H. & N. 561; *S. C.* 27 L. J., Exc. 465.

that he had limited the extent of the agency by certain rules and regulations."

Guarantee.

And a man has been held liable upon a guarantee given in his name by his son who had signed for his father in three or four instances, and had accepted bills for him (*r*).

Servant without precise authority has all powers necessary and usual in similar cases.

Where a servant is employed to transact business, and has *no particular orders* with reference to the manner in which the business is to be transacted, he is considered as invested with all the authority necessary for transacting the business entrusted to him, and which is *usually* entrusted to agents (*s*) employed in matters of a similar nature. In this respect there is no distinction whether the authority be general or special, express or implied. In each case it embraces the appropriate means to accomplish the desired end (*t*). Thus a servant sent without money to buy goods has implied authority to pledge his master's credit (*u*).

Warranty by servant entrusted to sell.

Upon this principle it was held in a very old case (*x*) that if a goldsmith make plate wherein he mingles dross, so that it is not according to the standard, and send his servant to a fair to sell it, who sells it for good plate, according to the standard, an action upon the case lies against the master. And so a horse-dealer has been held liable upon the warranty of his servant entrusted to sell, where the warranty was part of the transaction of sale (*y*).

Helyear v. *Hawke.*

And so also where a person who was not a horse-dealer, sent his servant with his horse to Tattersall's for sale, with instructions to warrant him sound, and he warranted him free from vice; the master was held liable upon the warranty, although it was contended on his behalf that the servant was but a special agent, and he having exceeded his authority, the master ought not to be bound. But, said Lord Ellenborough, C. J., "the master having entrusted the servant to sell, he is entrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing, he binds his master" (*z*). And in another case (*a*), where the defendant's servant, who was entrusted to sell and receive the price, sold a horse at a fair to the plaintiff, and warranted him sound, the defendant was held liable for a

Alexander v. *Gibson.*

(*r*) *Watkins* v. *Vince*, 2 Stark. 368.

(*s*) Story on Ag. 60; and see *per* Lord Wensleydale, in *Cox* v. *Midland Counties Railway Company*, 3 Exc. 278.

(*t*) Story on Ag. 85, 97; *Howard* v. *Baillie*, 2 H. Bl. 618.

(*u*) *Tobin* v. *Crawford*, 9 M. & W. 718.

(*x*) *Southern* v. *How*, Cro. Jac. 471; and see *Hern* v. *Nicholls*, 1 Salk. 289. As to how far the master is affected by fraud of his servant, see *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Fuller* v. *Wilson*, 3 Q. B. 58; *Jones* v. *Downman*, 4 Q. B. 235, note; *Downman* v. *Williams*, 7 Q. B. 103; Story on Ag. 264.

(*y*) *Fenn* v. *Harrison*, 3 T. R. 760; *Pickering* v. *Busk*, 15 East, 45; *Helyear* v. *Hawke*, 5 Esp. 72; *Woodin* v. *Burford*, 2 Cr. & M. 391; see *Coleman* v. *Riches*, 16 C. B. 113.

(*z*) *Helyear* v. *Hawke*, 5 Esp. 72. In *Smith* v. *M'Guire*, 3 H. & N. 563, Pollock, C. B., said, "If a man sends his servant to market to sell goods, or a horse for a certain price, and the servant sells them for less, the master is bound by it."

(*a*) *Alexander* v. *Gibson*, 2 Camp. 555; see 16 C. B. 113.

breach of the warranty; and Lord Ellenborough said, "If the servant was authorized to sell the horse, and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual on the sale of horses to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is entrusted, in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty" (*b*).

Warranty must be part of transaction of sale to bind master. *Woodin* v. *Burford*.

But although a warranty by a servant entrusted to sell, given at the time of sale, and *as part of the transaction of selling*, will bind the master, yet an acknowledgment to that effect, made at another time, would not bind him (*c*). And where there had been a *previous bargain* between the plaintiff and the defendant, who was a horse-dealer, for the sale of a horse, and the defendant's servant, being sent to deliver the horse and receive the price, gave a warranty, the defendant was held not liable (*d*).

Alteration in warranty.

And so a master has been held not bound by an alteration in a warranty made by a servant sent to receive the price (*e*).

Implied authority cannot be extended to collateral transactions.

These two last-mentioned cases, however, depend upon the general rule, that *an implied authority cannot be extended to collateral transactions*.

Thus, though a clerk, apprentice or shopman, may have an implied authority to receive money paid in the usual course of business, you could not from that infer an authority to receive payments *out* of the usual course of business, as deposit on a wager, payment of a mortgage, legacy, or the like (*f*). So, a clerk who has authority to receive cash across the counter, has not authority to receive payments by cheque by post (*g*). So, a clerk employed to obtain orders, is not by reason thereof authorized to receive payment for goods supplied (*h*); and a debtor paying him, makes him *his* agent to hand the money to

(*b*) And if an agent, entrusted to sell and warrant, do sell and warrant, and receive the money, but afterwards, in consequence of the goods sold not answering the warranty, return the money to the purchaser, the principal cannot treat the price as money had and received to his use, by the agent, *Murray* v. *Mann*, 2 Exc. 538.

(*c*) *Helyear* v. *Hawke*, 5 Esp. 72, *supra*; *Peto* v. *Hague*, 5 Esp. 135; *Allen* v. *Dunstone*, 8 C. & P. 760; see Dyer, 76 *a*, citing 5 H. 7, 41 *b*.

(*d*) *Woodin* v. *Burford*, 2 Cr. & M. 391.

(*e*) *Strode* v. *Dyson*, 1 Smith, 400.

(*f*) *Sanderson* v. *Bell*, 2 Cr. & M. 304; and see *Sykes* v. *Giles*, 5 M. & W. 545, where it was held that an auctioneer, *expressly* authorized by the conditions of sale to receive a deposit, had no implied authority to receive the residue of the purchase-money. See also *Boulton* v. *Reynolds*, 29 L. J., Q. B. 11, where it was held that a man in possession of goods distrained for rent has no authority in law to receive the rent.

(*g*) *Kaye* v. *Brett*, 5 Exc. 269; see *Summers* v. *Solomon*, *ante*, p. 158.

(*h*) *Puttock* v. *Warr*, 31 Law T. 86.

the creditor, and if he fails to do so, must pay over again. So, a traveller who receives orders for goods from his employer's customers, if authorized to receive payment for them in *money*, cannot take other *goods* in payment (*i*).

Admission by servant out of course of business will not bind the master.

So, in an action against pawnbrokers (*k*) to recover plate deposited with them upon a mortgage, out of the usual course of business, an admission by a shopman of the defendant's that they had the plate, was held not admissible as evidence against them, for the transaction was not a transaction in the business of a pawnbroker, but a loan, as by any other lender of money at five per cent., and there was no evidence to show the agency of the shopman in private transactions, unconnected with the business of the shop. And Tindal, C. J., said, "If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendants, as pawnbrokers, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, *might* probably have been evidence against the master, as it *might* be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case the rule laid down by the Master of the Rolls in the case of *Fairlie* v. *Hastings* (*l*), which may be regarded as the leading case on this head of evidence, directly applies."

And it would be no answer to an action by a master against carriers for loss of, or injury to, his goods, that they had received them from a servant, and had settled with him, unless the servant was authorized by his master to settle (*m*). And an estate or farm agent employed to receive rents, and conduct such farming operations as repairing, draining, cutting timber, and the like, could not without express authority make admissions in writing, or otherwise, as to his employer's title, or bind him by proposals to purchase, or take on lease, the lands of another (*n*). Even an attorney, employed in a matter of business, is not an agent to make admission for his client except after action commenced, and in matters relating to that action (*o*).

Entry by deceased clerk only evidence of facts usually stated.

Upon similar principles it is that, although an entry made at the time when the facts recorded took place by a deceased clerk or other servant in the usual course of business, is evidence, after his decease, of the facts stated in such entry; yet if other facts, not usually stated in entries of a similar nature, happen

(*i*) *Howard* v. *Chapman*, 4 C. & P. 508.

(*k*) *Garth* v. *Howard*, 8 Bing. 451; *S. C.* 5 C. & P. 346; see *Gardner* v. *Moult*, 10 A. & E. 464, where the defendants were held bound by an admission by their servant of an act of bankruptcy on the part of a bankrupt.

(*l*) 10 Ves. 128; and see on this point, Story on Agency, s. 136; 1 Ph. on Ev. 382; *Price* v. *Marsh*, 1 C. & P. 60; *Jones* v. *Hart*, Lord Raym. 738; *S. C.* Salk. 441.

(*m*) *Coombs* v. *Bristol and Exeter Railway Company*, 3 H. & N. 1.

(*n*) *Ley* v. *Peter*, 26 L. J., Exc. 239.

(*o*) *Wagstaff* v. *Wilson*, 4 B. & Ad. 339; *Blackstone* v. *Wilson*, 26 L. J., Exc. 229.

to be mentioned in making a particular entry, it is not evidence of those facts (*p*).

Nor is it increased by emergency of particular occasion.

Hawtayne v. *Bourne.*

Moreover, the *implied power* of a servant to bind his master upon contracts relating to matters within the usual scope of his employment, is *not increased by the emergency* of any particular occasion (*q*). And, therefore, where (*r*) a mining company fell into difficulties in consequence of the calls not being paid up, and the agent from want of funds was unable to pay the labourers, who applied to the magistrates and obtained warrants of distress upon the materials belonging to the mine: whereupon the agent borrowed money upon the credit of the company and paid the wages, it was held that he had no implied authority to do so. Although there were circumstances in the case from which a jury might have inferred an express authority to borrow money for the purposes of the mine.

Cox v. *Midland Counties Railway Company.*

So a station-master, or other servant of a railway company, has no implied authority in case of accident to bind the company by calling in a surgeon to attend on passengers, for the power to enter into such a contract is not incident to his employment (*s*).

Contract made in servant's name.

It makes no difference in *the master's* liability that the contract is made in the *servant's name*, if in reality he were acting as agent for his master in making the contract. For parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price the contract is not varied by appearing to have been made by him in a name not his own (*t*).

Servant's intention merely to bind himself.

And so if a landed proprietor send his steward habitually to the neighbouring fairs and markets to make sales and purchases for him in matters connected with the management of his estate, and the steward makes all these contracts in his own name, but is universally known to have no land of his own, and to be

(*p*) *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; see *Price* v. *Earl of Torrington*, Salk. 285; *S. C.* 1 Smith's L. C. 139; 1 Ph. on Ev. ch. 7, s. 8, where all the prior cases are stated and commented on. See also *R.* v. *Dukinfield*, 11 Q. B. 678; 7 Exc. 3.

(*q*) Story on Ag. 87.

(*r*) *Hawtayne* v. *Bourne*, 7 M. & W. 595; and see *Ricketts* v. *Bennett*, 4 C. B. 686; *In re The German Mining Company*, 22 Law J., Ch. 926.

(*s*) *Cox* v. *Midland Counties Railway Company*, 3 Exc. 268.

(*t*) *Per* Lord Denman, C. J., in *Trueman* v. *Loder*, 11 A. & E. 594, 595; and see *Thomson* v. *Davenport*, 2 Smith's L. C. 225, 226; *Lindus* v. *Bradwell*, 5 C. B. 583. The general rule with regard to contracts made by agents is, that the agent may sue or be sued in respect of his privity, and the principal in respect of his interest. See *Sims* v. *Bond*, 5 B. & Ad. 389. Where, however, a servant or other agent has signed a written contract in his own name, he cannot give parol evidence to *discharge himself* from liability upon the contract, *Higgins* v. *Senior*, 8 M. & W. 834.

acting solely for his employer, by his direction, and on his credit; the steward's intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing could not deprive the vendor of his recourse against the master (*u*).

Effect of private orders to servant.

And, since the nature of the usual employment of a servant is the measure of his implied authority, it follows that that authority can neither be limited by the *private instructions* of the master, or controlled by any secret agreement between him and his servant. If this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principals? There would be an end of all dealing but with the master (*x*). Should the servant deviate from his master's orders or be guilty of a breach of any secret agreement between himself and his master, he will be accountable to his master for any loss he may sustain thereby, but third persons cannot be affected by any limitation of the servant's authority not communicated to them (*y*). In such cases, however, it is material to bear in mind the distinction before adverted to, between a special and a *general* authority ("the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance") (*z*), as the legal effect of secret instructions is very different in the two cases. The difference cannot be more clearly stated than in the words of Mr. Smith, in his Compendium of Mercantile Law. He says (*a*):—"The authority of a general agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, *i. e.*, an agent employed specially in one single transaction, for it is the duty of the party dealing with such a one to ascertain the extent of his authority, and if he do not he must abide the consequences" (*b*).

Innocent third persons not affected by them.

Distinction between general and special agent.

And difference in effect of private orders in such cases.

A servant may be regarded as the general agent of his master for all purposes within the scope of his employment. If employed for any unusual purpose, he may be looked upon as the special agent of his master (*c*). Thus, for instance, if a man

How far servant *general* agent of his master, and how far special.

(*u*) See *per* Lord Denman, in *Trueman* v. *Loder*, 11 A. & E. 593.

(*x*) 10 Mod. 110.

(*y*) Paley on Ag. 199; 1 Pothier on Oblig. by Evans, n. 79; see also *ib.* n. 447, 448; *Cahill* v. *Dawson*, 26 L. J., C. P. 253; *S. C.* 3 C. B., N. S. 106.

(*z*) *Per* Lord Ellenborough in *Whitehead* v. *Tucket*, 15 East, 408; and see Paley on Ag. 199.

(*a*) Smith's Merc. Law, 119; see Story on Ag. s. 126, and note 2 to s. 127; *Hawken* v. *Bourne*, 8 M. & W. 710.

(*b*) Mr. Justice Story, after quoting the words in the text, adds, "This is true if the agent is not held out as possessing a more enlarged authority," Story on Agency, s. 126, note 2.

(*c*) The nature and extent of a servant's implied authority must, however, as is obvious, frequently involve questions fit for the consideration of a jury. See Smith's Merc. Law, 117; *Dyer*

were in the habit of paying for hay and straw purchased by his groom, the groom might be regarded as his general agent for the purchase of a reasonable quantity of hay and straw, and the master would be liable to pay for such hay and straw purchased by the groom, even if in a particular instance the groom acted contrary to his master's orders. But such a groom could not be looked upon as the general agent of his master, so as to render him liable to pay for *anything else* the groom might choose to buy in his master's name, the obtaining other things not being within the scope of his employment. If he were sent by his master with money to purchase beer or wine, he would be a special agent for that occasion; and if the person of whom he bought it chose to let him take it away without payment and without ascertaining that he had authority to pledge his master's credit, he must abide the consequences; the master would not be liable.

Implied *general* authority cannot be limited by private orders.

Bearing, therefore, this distinction in mind, it may be stated as a general rule, that wherever a master has by his conduct held out his servant as his general agent, whether in all kinds of business or in transacting business of a particular kind, the master will be bound by the act of his servant, if within the scope of his usual employment, notwithstanding the servant has acted contrary to his master's orders.

Nickson v. *Brohan*.

Thus, where (*d*) a master sent his servant, *who was used to transact affairs of that nature for him*, on Saturday, with a note drawn on Sir S. E., with orders to get from Sir S. E. either bank bills or money and turn them into Exchequer notes, but the servant to save himself time and trouble, went to B., and prevailed with him to give him a bank bill for the note upon Sir S. E., and then, in pursuance of his master's orders, invested it in Exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir S. E. Sir S. E. failed upon the Monday following. The question was upon whom the loss should fall, B. or the master. And the whole court were of opinion that the master was chargeable and he only, for a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; and, if this general authority should be liable to be determined for a time by any particular instructions or orders to which none but the master and servant are privy, there would be an end of all dealing but with the master.

Horse-dealer liable on warranty of servant, ordered not to warrant.

Upon similar grounds rests the distinction that if a horse-dealer or a person keeping livery stables, having a horse to sell, expressly direct his servant not to warrant him, and the servant do

v. *Pearson*, 3 B. & C. 38; *Todd* v. *Robinson*, Ry. & M. 217; *Gillman* v. *Robinson*, Ry. & M. 226; *Barnett* v. *Lambert*, 15 M. & W. 493; *Reynell* v. *Lewis*, 15 M. & W. 517; *Williams* v. *Pigott*, 2 Exc. 201.

(*d*) *Nickson* v. *Brohan*, 10 Mod. 109; *Ward* v. *Evans*, 2 Salk. 442; 6 Mod. 36; 2 Lord Raym. 928; *Thorold* v. *Smith*, 11 Mod. 71, 87; see *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248; *Smith* v. *M'Guire*, 3 H. & N. 554; *S. C.* 27 L. J., Exc. 465.

nevertheless warrant him, still the master would be liable upon the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant (*e*); but if the owner of a horse were to send *a stranger* to a fair *with express directions not to warrant* the horse, and the latter acted *contrary to the orders*, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his authority (*f*).

But not on warranty of stranger, ordered to sell, and not warrant.

Upon the same principle a gentleman, who by an agreement with his groom allowed him five guineas a year for which he was to keep the horses shod, was held nevertheless to be liable to pay a farrier's bill for shoeing his horses, as it did not appear that the farrier knew of the agreement; and Lord Kenyon said, "That unless the farrier knew of the agreement and expressly trusted the groom it was no defence, for a tradesman has nothing to do with any private agreement between the master and servant" (*g*). And where (*h*) a gentleman contracted with his coachman, at 220*l.* a year, to provide horses and his own livery and everything connected with the carriage, but the coachman went in his master's livery to the plaintiff's stables and represented that he wanted a pair of job-horses for his master's carriage, and an agreement was made with him, at ten guineas a month, whereupon he took the horses away, and his master used them, and the plaintiff then sued the master for four months' hire; it was held not necessary for the plaintiff to prove that the coachman acted by his master's authority, as he had used the horses: and Littledale, J., said, "If the coachman made the contract in his own name, and represented to the plaintiff the agreement between himself and his master, of course, under such circumstances, the plaintiff cannot recover; but if he made no such representation of any agreement between himself and his master, I think *that by the master sending him forth into the world, wearing his livery*, to hire horses which he (the master) afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire. A master may be prevented by business or want of time from making a bargain himself, and may send his servant, and *provided the business be within the regular department of the servant, the master is clearly liable.*" The

Precious v. *Abel.*

Rimell v. *Sampayo.*

(*e*) *Fenn* v. *Harrison*, 3 T. R. 760; *Pickering* v. *Busk*, 15 East, 45; see Story on Agency, s. 132. In note 4, that learned author says, "In America livery stable keepers are not understood to give their servants any general authority to sell their horses."

(*f*) *Ibid.* But if the master is unwilling to adopt a warranty given by his servant under such circumstances, he is bound to take back the horse and return the money, if paid. To hold otherwise would be to allow him to take advantage of his servant's fraud. See *per* Lord Abinger in *Cornfoot* v. *Fowke*, 6 M. & W. 381.

(*g*) *Precious* v. *Abel*, 1 Esp. 350.

(*h*) *Rimell* v. *Sampayo*, 1 C. & P. 255.

jury, however, *having found that there was no evidence of any direct application to the master on the part of the plaintiff*, found a verdict for the defendant (*i*).

If third party know of private orders, master not bound.

If a third party, dealing with a servant on behalf of his master, *know* of the private agreement or instructions given by the master to his servant, he cannot of course charge the master (*k*) upon any contract contrary to that agreement. Accordingly, where (*l*) the defendant sent his son to obtain from the plaintiff a horse which he had agreed to sell to the defendant, and the plaintiff knew that the son was instructed only to take the horse *if* warranted, but the son took it without a warranty, it was held that the defendant was not liable to pay for the horse, which did not answer the warranty agreed to be given.

Jordan v. *Norton*.

Where servant is a special agent, parties dealing with him must inquire into his authority.

But where a *servant* is employed by his master to act for him in a *single transaction*, he must be regarded as the *special agent* of his master; and, in such case, it is incumbent upon every one dealing with him, who wishes to charge his master upon his contracts, to inquire into the extent of his authority, as, should he exceed it, his master will not be bound.

Ward v. *Evans*.

And, therefore, where (*m*) the plaintiff sent his servant to receive 60*l.* from B., and B. desired E., who owed him money, to strike off 60*l.* from his debt and pay the plaintiff's servant; E. accordingly credited himself with 60*l.* in account with B., but instead of giving the plaintiff's servant *money* gave him a goldsmith's *note*, which the servant accepted as payment; it was held that the plaintiff was not bound by the act of the servant in receiving the note instead of money.

Waters v. *Brogden*.

Again, where (*n*) the defendant drew a cheque in favour of a creditor, and gave it to his own farm bailiff (who bought and sold cattle for him) with instructions to deliver it to the creditor in whose favour it was drawn, but the bailiff, at the request of the creditor, got it discounted by the plaintiff (a banker at some distance), and gave the money to the creditor; some days afterwards the bankers on whom the cheque was drawn failed, and the plaintiff having omitted to present the cheque to them, brought an action against the defendant for the amount: but Alexander, C. B., was of opinion that the defendant was not bound by the act of his farm bailiff, who had no authority to act as he had done.

Fenn v. *Harrison*.

So, as we have seen, if the owner of a horse send a *stranger* to a fair, with express directions not to warrant the horse, and the latter act contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the

(*i*) See *Hiscox* v. *Greenwood*, 4 Esp. 174, where a servant, having acted beyond the scope of his employment, Lord Ellenborough thought the tradesman, not having inquired of the master, could not charge him.

(*k*) *Howard* v. *Braithwaite*, 1 Ves. & B. 209.

(*l*) *Jordan* v. *Norton*, 4 M. & W. 155. In this case, however, it will be observed, that the son was a *special* agent, into whose authority the party dealing with him is bound to inquire.

(*m*) *Ward* v. *Evans*, 2 Lord Raym. 928; *S. C.* Salk. 442.

(*n*) *Waters* v. *Brogden*, 1 Y. & J. 457.

owner would not be liable on the warranty, because the servant was a special agent, and was not acting within the scope of his authority (*o*).

And where a person dealing with an agent has *notice*, either from the mode in which the authority is exercised, or it would seem in any other manner, that the agent is acting under a *special* authority; as, for instance, where a bill of exchange is accepted or indorsed by a clerk or cashier "per procuration" of A. B. (the master), C. D. (the agent or servant), he is, *à fortiori*, bound to inquire whether or not the authority has been properly followed; and if he do not make such inquiries, and it turn out that the party exceeded his authority, he must suffer for his temerity (*p*). And so where person dealing with him has notice that he is a special agent.

Therefore, where (*q*) the manager of a banking company, who had authority to draw, accept and indorse bills, on account *and for the benefit* of the company, indorsed a bill for the accommodation of one G., "per proc." of the company, and signed his name, it was held, that the company were not bound by such indorsement. And Coltman, J., said, "Any house may allow a clerk to indorse bills of exchange in the name and on account of the firm, and so give currency to them, notwithstanding any secret limitation of his authority. If this banking company had been in the habit of allowing their cashier or manager to indorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances or the precise extent of such authority. But in every instance the indorsement *by the form of it bears an intimation* to the public, that the manager acts under a special authority; and therefore the persons into whose hands the bills might come, were bound to see that the authority was properly pursued." *Alexander* v. *Mackenzie.*

If upon inquiry into the authority of such an agent, it should turn out that he is acting under a *written* authority, parties dealing with him should call for the production of the authority, for should the agent exceed his authority, his principal will not be bound (*r*). This rule indeed applies equally to the case of a general agent. Written authority of servant must be inspected.

If, however, the act assumed to be done is within the authority given, (in ascertaining which the authority must be *strictly* construed,) (*s*) the principal will be bound, although the act done may be in violation of private instructions as to the mode of executing the authority. With such instructions third parties have nothing to do (*t*). It is therefore important to bear in Private instructions need not.

(*o*) *Fenn* v. *Harrison*, 3 T. R. 760; see Paley on Ag. 202.

(*p*) *Jordan* v. *Norton*, 4 M. & W. 155; *Neale* v. *Turton*, 4 Bing. 149.

(*q*) *Alexander* v. *Mackenzie*, 6 C. B. 766; see *Smith* v. *Johnson*, 3 H. & N. 222; *Smith* v. *M'Guire*, 3 H. & N. 554, *ante*, p. 160.

(*r*) *Attwood* v. *Munnings*, 7 B. & C. 278; Story on Agency, s. 72; and see the American case of *North River Bank* v. *Aymar*, 3 Hill R. 262, there quoted. See also *Balfour* v. *Ernest*, 28 L. J., C. P. 170, *et* cas. *ib.* cit.

(*s*) *Attwood* v. *Munnings*, *ubi supra*; *Howard* v. *Baillie*, 2 H. Bl. 618.

(*t*) Story on Ag. 73; and see *Smethurst* v. *Taylor*, 12 M. & W. 545.

mind the distinction between the two, although it is not in all cases easy to distinguish the one from the other.

Where master is not bound by contract of servant.

But *where a master has not* either expressly, or by implication, from a course of dealing, *authorized his servant* to pledge his credit, his servant cannot, by so doing, render him liable to pay for goods so obtained.

Stubbing v. *Heintz.*

Thus (*u*), where the defendant contracted with the plaintiff to serve him with meat at a certain price *for ready money*, and the cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it, generally on Monday morning, and the defendant always gave her money to pay; which course of dealing continued for a long time, till at last the defendant got a cook who embezzled the money; it was held that the defendant was not liable, and Lord Kenyon, C. J., said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again. But if the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit."

Pearce v. *Rogers.*

And so where (*x*) the defendant dealt with the plaintiff for the porter used in his family, and was in the habit of paying ready money to the plaintiff for a certain quantity which was allowed for the family, but the maid-servant obtained some clandestinely for her own use, and that of the defendant's wife's mother, but it did not appear that the plaintiff knew of this circumstance, it was held that the defendant was not liable; Lord Eldon saying, that "to allow such a demand would be to put it in the power of servants and tradesmen to ruin the master."

Maunder v. *Conyers.*

Again, where (*y*) a butler ordered brandy in his master's name, and the brandy was consumed by the butler and cook, without the master being privy to the order, delivery or consumption, the master was held not liable to pay for it.

Hunter v. *Countess of Berkeley.*

And where (*z*) a lady ordered of a tailor two suits of livery a year for her coachman, and the tailor supplied one; but, at the desire of the coachman, supplied plain clothes instead of the other, it was held that the lady was only liable to pay for the livery actually supplied, and was entitled to set off against a subsequent account for clothes the price of a suit of livery which had been supplied and paid for, but taken back by the tailor from the coachman.

Hiscox v. *Greenwood.*

Upon similar principles where (*a*) a servant, having injured his master's chaise by careless driving, left it with a coachmaker to be repaired without acquainting his master, and without any orders from him, and it appeared that he had never employed the coachmaker, who refused to deliver up the chaise without

(*u*) *Stubbing* v. *Heintz*, Peake, 47; and see *per* Lord Abinger, C. B., in *Flemyng* v. *Hector*, 2 M. & W. 181.

(*x*) *Pearce* v. *Rogers*, 3 Esp. 214.

(*y*) *Maunder* v. *Conyers*, 2 Stark. 281.

(*z*) *Hunter* v. *Countess Dowager of Berkeley*, 7 C. & P. 413.

(*a*) *Hiscox* v. *Greenwood*, 4 Esp. 174.

payment of his bill for the repairs. The master having brought an action for the chaise, recovered; as it was held that the coachmaker, not having inquired of the master whether the order for repairs was given by his authority, had no claim against him for the amount of his bill.

Servant left in charge of children.

So if a servant be left in charge of children with a sufficient allowance for their support, he has no power to pledge his master's credit for necessaries or goods supplied for the support of the children (*b*).

Implied authority of farm bailiff.

The bailiff of a large farming establishment, through whose hands all payments and receipts takes place, has no implied authority to pledge the credit of his employer by drawing and endorsing bills in his name (*c*).

Mining agent.

Nor has the resident agent (*d*) of a mining company, or a co-adventurer (*e*), an implied authority to borrow money upon the credit of the shareholders.

And the secretary of a company who has authority only to accept bills drawn by A. on the company, cannot bind the directors by accepting bills drawn by B. (*f*)

Agent to Insurance Company.

Nor has the country agent of an insurance company authority to receive payment of premiums after the usual fifteen days' grace (*g*). Nor has the agent of an insurance company power to bind the company by issuing policies contrary to the deed of settlement (*h*).

Secretary of Railway Company.

Nor has the secretary of an intended railway company implied authority, *as such*, to bind individual members of the provisional or managing committee upon contracts, even for articles necessary for carrying on the business of the company. In order to fix them with liability to pay for goods, work or labour, &c., ordered by the secretary, it is necessary to connect the party sought to be charged with the order, either by showing his previous consent or subsequent recognition of it (*i*). The same principle applies to letters written by such secretary. They are only binding upon the board of directors, or such members of it as authorized the secretary to write them (*k*). Therefore, where (*l*) an engineer brought an action against a provisional committeeman of a railway company for work and labour in surveying the intended line of railway, and the only evidence to charge the defendant was a letter written by the secretary, but

Rennie v. *Wynn.*

(*b*) *Atkyns* v. *Pearce*, 26 L. J., C. P. 252.

(*c*) *Davidson* v. *Stanley*, 2 M. & G. 721; see *Waters* v. *Brogden*, 1 Y. & J. 457.

(*d*) *Hawtayne* v. *Bourne*, 7 M. & W. 595.

(*e*) *Ricketts* v. *Bennett*, 4 C. B. 686.

(*f*) *Neale* v. *Turton*, 4 Bing. 149.

(*g*) *Acey* v. *Fernie*, 7 M. & W. 151.

(*h*) *Hamburgh* v. *Hull and London Fire Insurance Company*, 3 H. & N. 789.

(*i*) See *Barnett* v. *Lambert*, 15 M. & W. 489; *Reynell* v. *Lewis*, 15 M. & W. 517; *Cooke* v. *Tonkin*, 9 Q. B. 936; *Barker* v. *Stead*, 3 C. B. 946; *Williams* v. *Pigott*, 2 Exc. 201; *Bailey* v. *Macaulay*; and other cases, 19 L. J., Q. B. 73; 13 Q. B. 815.

(*k*) *Burnside* v. *Dayrell*, 3 Exc. 224; and see *Todd* v. *Emly*, 7 M. & W. 429.

(*l*) *Rennie* v. *Wynn*, 4 Exc. 691.

there was no evidence to connect the defendant with the letter, the plaintiff was nonsuited.

Cashier of Bank.

Upon similar principles it has been held in America in a case (*m*) in which the cashier of a bank wrote to the secretary of the treasury saying that the bearer was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, that the bank was not bound to reimburse the money which the secretary of the treasury advanced. And in another case (*n*), that a release given by the president and cashier of a bank to the indorser of a promissory note of his liability upon it, did not bind the bank: neither one nor both having authority to make contracts of that kind.

Credit given to servant, with knowledge that he was his master's agent, and who his master was.

Nor can a master be rendered liable upon a contract made by his servant, if at the time the contract is entered into, the party with whom it is made know not only that the servant is only an agent, but also who his master or principal is (*o*); and notwithstanding that knowledge choose to *make the servant his debtor*, dealing with him and him alone. In that case the party cannot, on the failure of the servant to perform the contract, turn round and charge his master, having once made his election at the time when he had the power of choosing between the one and the other (*p*).

Use by master of things obtained on his credit.

The fact that articles purchased by a servant have been *used by the master* will not alone make the master liable to pay for them where the previous conduct of the master was not such as to give the servant an implied authority to pledge his credit. That fact, however, would be sufficient *primâ facie* evidence to charge the master, unless he could discharge himself by showing either that the credit was given to the servant, or that the servant was supplied by him with ready money to pay for the articles purchased, and therefore had no authority to pledge his master's credit (*q*).

Termination

And a master who has been in the habit of paying for goods

(*m*) *United States* v. *City Bank of Columbus*, 21 How. 356.

(*n*) *Bank of United States* v. *Dunn*, 6 Peters, 51.

(*o*) If the party know the servant to be merely an agent, but do not know who his principal is, and debit the servant; he may, in that case, charge the principal when discovered, *Thomson* v. *Davenport*, 9 B. & C. 78; and see *Thomas* v. *Edwards*, 2 M. & W. 215.

(*p*) See *per* Lord Tenterden in *Thomson* v. *Davenport*, 9 B. & C. 86, following the cases of *Addison* v. *Gandassequi*, 4 Taunt. 574; and *Paterson* v. *Gandassequi*, 15 East, 62; see 2 Smith's L. C. 198, *et seq.* And see the converse case of *Ramazotti* v. *Bowring*, 29 L. J., C. P. 30.

(*q*) Paley on Ag. 165; *Pearee* v. *Rogers*, 3 Esp. 214. See, however, *Rimell* v. *Sampayo*, 1 C. & P. 255, *ante*, p. 167, where Littledale, J., thought that if the master use the articles, he ought to ascertain that his credit is not pledged; but the jury thought the tradesman ought to ascertain that the servant had authority to pledge his master's credit. And see *Hiseox* v. *Greenwood*, 4 Esp. 174, *ante*, p. 170; *Pauling* v. *London and North-Western Railway Company*, 8 Exc. 867; *Smith* v. *Hull Glass Co.*, 11 C. B. 897.

ordered by his servant, and has thus impliedly given him authority to pledge his credit, may, by *giving notice* to the tradesman who has supplied the goods on those terms, *revoke or terminate the servant's authority* to pledge his master's credit. of implied authority by notice.

Where it is clear that the tradesman has received notice of the revocation or termination of a servant's authority to pledge his master's credit, a court of equity would grant an injunction to restrain an action brought by such tradesman against the master to recover the price of goods supplied to the servant as on the master's credit after notice; as in the case of a wine merchant suing the master for the price of wine supplied to a discharged butler after notice of such discharge (*r*). Injunction to stop action brought after notice.

Where (*s*), however, the defendant had been in the habit of dealing with the plaintiff for beer on credit, but once, when he paid the bill, told the man who brought the beer that he would run up no more bills with the plaintiff, but would pay for the beer as it came in, and afterwards gave his servant money to pay for the beer, but the servant embezzled it, the defendant was held liable, as he did not show that the plaintiff himself had notice of this change in the mode of dealing; and Lord Eldon said that unless he had, it must be taken that the plaintiff understood that the dealings between him and the defendant continued in the usual way. Notice to tradesman's servant not sufficient.

And it is clear that mere notice to the servant himself, who had general authority to make contracts in his master's name, would not exonerate the master from liability upon contracts made by the servant after his discharge (*t*). Mere revocation of servant's authority insufficient.

Thus in a case (*u*) where a servant had power to draw bills of exchange in his master's name, and afterwards was turned out of the service, Holt, C. J., said: "If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master." —— v. *Harrison*.

The case of *Monk* v. *Clayton* (*x*) "where the act of a servant, though out of place, bound his master by reason of the former credit given him by his master's service, the other not knowing that he was discharged," is one of a similar kind. *Monk* v. *Clayton*.

The master's death operates as a revocation of the servant's authority to pledge his credit; after that event, therefore, the Death of master.

(*r*) *Duke of Devonshire* v. *Laforest*, M. R. Feb. 23, 1854.

(*s*) *Gratland* v. *Freeman*, 3 Esp. 85.

(*t*) *Trueman* v. *Loder*, 11 A. & E. 589; *Aste* v. *Montague*, 1 Fost. & F. 264. See *Tassell* v. *Cooper*, 9 C. B. 509, where the question arose whether a farm bailiff, who had orders to deal no more with his master's property, was justified in receiving money for wheat sold previously.

(*u*) —— v. *Harrison*, 12 Mod. 346; and see *Newsome* v. *Coles*, 2 Camp. 617, where, after a dissolution of partnership, and notice of it published in the *London Gazette*, and sent round to all the customers of the firm, the retiring partners were held not liable to pay bills drawn or accepted by the remaining partner in the name of the old firm.

(*x*) Cited by the Court in *Nickson* v. *Brohan*, 10 Mod. 110.

master's representatives would not be bound by the servant's contracts (*y*).

Lapse of time.

Lapse of time, also, would, it is conceived in many cases, raise a presumption that the servant's authority to pledge his master's credit was terminated (*z*).

IN CASES OF TORT—CRIMINALITER.

Master is not in general responsible, criminaliter, for the acts of his servant;

A master is not, generally speaking, criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour (*a*). And where one employs another to do a thing and there are several ways of doing it, one criminal and another innocent, and he does it in a criminal manner, the employer is not responsible (*b*).

except where he expressly orders an illegal act.

But where one man *expressly* orders another to do an illegal act it is clear that the employer at least is accountable for that act (*c*). Whether or not the person employed is also criminally responsible must depend upon circumstances (*d*).

Employer of an innocent agent is principal though absent.

If a man employs an innocent agent (*e*) for the purpose of committing any crime, the employer is the principal offender and liable to be indicted and punished as such, although he be absent when the crime is actually committed. This principle is constantly acted upon in the administration of criminal law. But it may be convenient to mention a few cases illustrative of it.

(*y*) See *Blades* v. *Free*, 9 B. & C. 167.

(*z*) —— v. *Harrison*, 12 Mod. 346.

(*a*) *R.* v. *Huggins*, 2 Str. 882; *S. C.* 2 Lord Raym. 1574; Paley on Ag. 303; Story on Ag. s. 452; Smith's Merc. Law, 139. So a sheriff is not liable *criminaliter*, though he is *civiliter*, for the acts of his bailiff, *Laycock's Case*, Latch. 187; *Sanderson* v. *Baker*, 3 Wils. 310, 316; *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Stanway q. t.* v. *Perry*, 2 B. & P. 157; *Pechell* v. *Layton*, 2 T. R. 512, 712; *Brown* v. *Compton*, 8 T. R. 424; *Sturmy q. t.* v. *Sheriff of Middlesex*, 11 East, 25; or his bailiff's follower, *Gregory* v. *Cotterell*, 25 L. J., Q. B. 33; *S. C.* 5 E. & B. 571; see *Boulton* v. *Reynolds*, 29 L. J., Q. B. 11.

(*b*) See *Peachey* v. *Rowland*, 13 C. B. 182; *S. C.* 20 L. T. 208. See also *per* Lord Wensleydale in *Cooper* v. *Slade*, *post*, p. 177.

(*c*) Fost. 125. Upon this principle it was held that the conviction of a servant for using water, unappealed against, was evidence against his master that he had no right to use it so, *Eaton* v. *Swansea Waterworks*, 17 Q. B. 267.

(*d*) See a curious case of *R.* v. *Woodburn and Coke*, 16 How. St. Tr. 54, where W., a hired labourer, and C., his master, were tried, condemned, and executed under the Coventry Act (22 & 23 Car. 2, c. 1), for slitting a man's nose.

(*e*) An agent, or servant, concurring in a crime for the purpose of aiding in the detection of his employer, is looked upon as an innocent agent, *R.* v. *Bannen*, 1 C. & K. 295; *S. C.* 2 Mood. C. C. 309. The distinction between an innocent and a guilty agent, is now practically unimportant in punishing the principal, since an accessory before the fact may now be indicted, tried, convicted and punished in all respects as if he were a principal, 11 & 12 Vict. c. 46, s. 1; and see 14 & 15 Vict. c. 100, s. 15.

The prisoner, who was a wet nurse in a family, and had put her own child out to nurse, gave S., the person in charge of it, a bottle of laudanum, with directions to give it to the child, saying it was medicine and would do the child good; but S. said the child was well and did not want medicine, and put the bottle on the mantel-piece without opening it. A few days afterwards, whilst S. was out, one of her children got hold of the bottle and gave some to the child, who died in consequence: it was held by the judges that the administering the poison by S.'s child was, under the circumstances, as much in point of law an administering by the prisoner as if she had actually administered it with her own hand. They, therefore, held that she was rightly convicted of murder (*f*). Murder. *R.* v. *Michael.*

So where the prisoner (*g*) gave a forged note to a boy (who did not know that it was forged), and directed him to pay it away at N.'s shop for goods. The boy did so, paid the note to N. and brought back the goods and change to the prisoner. This was held by the twelve judges to be an uttering of the forged note by the prisoner to N. Forgery. *R.* v. *Giles.*

Again, where two dock porters stole a quantity of molasses, and by direction of H., a dealer in that article, took it to his warehouse and left it with M., who was H.'s servant, and who knew it to be stolen: it was held that both the dealer and his servant might be convicted of receiving stolen goods, although the dealer was absent at the time the molasses was left at his warehouse, but it was clear that shortly after he came home, he was aware of the molasses having been left, and there was strong ground for supposing that he then knew that it had been stolen (*h*). Receiving stolen goods. *R.* v. *Parr.*

So in a case (*i*) where B. was one of many persons employed by a company, whose wages were paid weekly at a pay-table by the treasurer of the company. On one occasion when B.'s wages were due, the prisoner promised a boy a penny if he would go and get B.'s money. The boy innocently went to the pay-table, and said to the treasurer, I am come for B.'s money, and B.'s wages were given him. He took the money to the prisoner, who was waiting outside, and gave him the penny: it was held that the prisoner might have been convicted on a count charging him with obtaining B.'s money from the treasurer by falsely pretending to the treasurer (as he did by means of the boy) that the boy had authority from B. to receive his wages. Obtaining money by false pretences. *R.* v. *Butcher.*

Upon similar principles, a person who employed another to harbour poachers, who were indicted for maliciously shooting at Accessory after the fact, by an agent.

(*f*) *R.* v. *Michael*, 9 C. & P. 356; *S. C.* 2 Mood. C. C. 120. And see *R.* v. *Wilson*, 26 L. J., M. C. 18; *S. C.* 1 Dears. & B. C. C. 127, causing poison to be taken with intent to procure abortion.

(*g*) *R.* v. *Giles*, 1 Mood. C. C. 166; and see *R.* v. *Palmer*, 1 New Rep. 96; *S. C.* 2 Leach, 978; *R.* v. *Brisac*, 4 East, 164; *R.* v. *Mazeau*, 9 C. & P. 676; *R.* v. *Clifford*, 2 C. & K. 202.

(*h*) *R.* v. *Parr*, 2 Mood. & Rob. 346.

(*i*) *R.* v. *Butcher*, 28 L. J., M. C. 14; *S. C.* 1 Bell Cr. C. 6.

R. v. *Jarvis.*

a keeper, was convicted as an accessory after the fact, though he himself did no act of relieving them (*k*).

Stealing coal by hands of servants.

R. v. *Bleasdale.*

Again, where (*l*) the lessee of a coal-mine had, from the shaft opened to work it, carried on extensive workings of coal, and by means of these workings had gotten coal belonging to about forty different proprietors, without their sanction or knowledge, and had thus unlawfully possessed himself of 10,000*l.* worth of the coal of other persons (the evidence extended to the getting of coal continuously during a period of upwards of four years, and to operations conducted by different underlookers and by many different workmen); but it did not appear that the lessee had himself personally touched or removed any of the coal; he was nevertheless convicted of stealing it (*m*): Erle, J., observing, "The prisoner did not by his own hand pick or remove the coal; but if a man does, by means of an innocent agent, an act which amounts to a felony, the employer and not the innocent agent is the person accountable for that act."

Master not responsible where another's negligence added to his caused death.

But where a master was engaged in making fireworks illegally (*i. e.* contrary to statute 9 & 10 Will. 3, c. 7, s. 1), some of which, in his absence, by an intervening negligent act of his servant, exploded, and a rocket flew across the street, set fire to a house and burnt one of the inmates to death: it was held that the master could not be convicted of manslaughter, as it was the superadded negligence of some one else that caused the death (*n*).

Servant, unless innocent, is principal, and master accessory before the fact.

If the servant be not an innocent agent, he would, in law, be regarded as the principal offender, and his master, if absent when the crime was committed, would be considered an accessory before the fact (*o*). Though this distinction now is practically unimportant in punishing the master (*p*).

Exceptions in cases of implied orders of master.

There are, moreover, many cases in which the act of the servant, having been within the usual scope of his employment, has been considered to have been done by the *implied* command of the master, and *he* has been held criminally responsible for it, although he may, in the particular instance, have been perfectly ignorant of the doing it.

Cases of libel.

Thus in cases of libel, previously to the statute 6 & 7 Vict. c. 96, the publishers and proprietors of newspapers and other publications were frequently held liable to criminal informations for libels published by their servants in the usual course of their employment, although such publishers and proprietors personally had nothing to do with the publica-

(*k*) *R.* v. *Jarvis*, 2 Mood. & Rob. 40.

(*l*) *R.* v. *Bleasdale*, 2 C. & K. 765; see *Michell* v. *Brown*, 28 L. J., M. C. 53, where it was held that the owner of a vessel might be convicted of throwing rubbish, &c., into a navigable river contrary to a statute, though not on board when it was done.

(*m*) Under 7 & 8 Geo. 4, c. 29, s. 37.

(*n*) *R.* v. *Bennett*, 28 L. J., M. C. 27; *S. C.* 1 Bell Cr. C. 1.

(*o*) *R.* v. *Williams*, 1 C. & K. 589. A person abroad may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts, *per* Lord Campbell in *R.* v. *Garrett*, 23 L. J., M. C. 23; *S. C.* 1 Dears. C. C. 241.

(*p*) *Supra*, p. 174, note (*e*).

tion of the libels (*q*). Evidence of publication by a servant, however, only affords a *primâ facie* presumption of his master's guilt, which he may now rebut by proving that such publication was made without his authority, consent or knowledge, and did not arise from want of due care and caution on his part (*r*).

Action for penalties.

Again, in the following case, a man was held liable to an action for penalties, through the act of one who was considered his agent (*s*).

Cooper v. *Slade*.

An election was about to take place at C.; S. was one of the candidates, and in his committee-room the question was discussed whether paying the expenses of bringing up out-voters was legal. S., after referring to a law-book, said it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed, requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion, a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, "your railway expenses will be paid." A voter who resided at H., received one of the circulars with this added note; he came to C. and voted for S., and afterwards received 8*s*., the expenses to which he had *bonâ fide* been put by his journey. It was held by the House of Lords, that the words added to the circular must be treated as written by authority of S., and that he was, therefore, liable to the penalties attached to bribery under the Corrupt Practices Prevention Act, 1854 (*t*). In giving judgment, Lord Wensleydale said, "I take the law to be clear, that a man cannot be guilty by his agent of an illegal act and be held responsible for that act, unless he has given the agent authority, express or implied, to do that illegal act. I know that the law of agency in such cases has been much extended by committees of the House of Commons, but I take it to be a clear proposition of law, that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal unless a great deal more is shown: unless it is shown that the principal directed the agent so to act, or really meant he should so act or afterwards ratified the illegal act, or that he appointed one to be his agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of the candidate. If the candidate gives his agent such a general authority, and the agent is guilty of bribery, the

(*q*) *R.* v. *Almon*, 5 Burr. 2686; *R.* v. *Walter*, 3 Esp. 21; *R.* v. *Gutch*, M. & M. 433, 438. As to the liability of the editor to indemnify the proprietor when fined for the publication of a libel, see *Colburn* v. *Patmore*, 1 Cr. M. & R. 73. It is not *necessary, now*, in actions, prosecutions or other proceedings for libel contained in a newspaper, to prove that it was purchased of the defendant or his servants, see 6 & 7 Will. 4, c. 76, s. 8; though that course *may* be adopted, *R.* v. *Baldwin*, 8 A. & E. 168.

(*r*) 6 & 7 Vict. c. 96, s. 7.

(*s*) *Cooper* v. *Slade*, 6 Ho. Lords Cas. 793.

(*t*) 17 & 18 Vict. c. 102. Candidates may now provide conveyance for voters, 21 & 22 Vict. c. 87.

candidate is no doubt responsible for it. I know that there is a very great difference in parliamentary practice upon this subject, but I conceive that the rule of law is as I have laid it down, that *no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way, directly or indirectly, authorized it,* as I have explained."

Informations for penalties.

So, also, masters have been frequently held liable to *informations for penalties* incurred by the breach of some statutory regulations by persons in their employ, although the masters themselves may have been perfectly ignorant that in the particular instance any breach of the law has been committed. These informations, it is true, do, in strictness, partake more of the nature of civil proceedings to recover that which is a debt to the crown, than of a criminal proceeding (*u*), but still they are *penal* proceedings, and it is conceived therefore that they may be properly mentioned in this place. Perhaps the most familiar instances of the master's liability to this kind of proceeding are to be found in cases, of informations for breach of the revenue laws, in which cases if a master were not held responsible for the acts of his servants, the revenue laws might, as was once (*x*)

(*u*) See *per* Bayley, B., in *Attorney-General* v. *Siddon*, 1 Cr. & J. 226; and see *Atcheson* v. *Everitt*, Cowp. 391, that penal actions are civil suits: and *Attorney-General* v. *Bowman*, 2 B. & P. 352, that witnesses to character are not admissible. Previous to 17 & 18 Vict. c. 122, s. 15, it was doubted whether the defendant, in informations for penalties, was admissible as a witness under 14 & 15 Vict. c. 99, *Attorney-General* v. *Radleff*, 10 Exc. 84; see now 18 & 19 Vict. c. 96, s. 36. But even now he is not admissible in informations under the Customs Acts. See 20 & 21 Vict. c. 62, s. 14; see also *Cattell* v. *Ireson*, 27 L. J., M. C. 107; *Attorney-General* v. *Le Merchant*, 2 T. R. 201; *Unwin* v. *Leaper*, 1 M. & G. 752, where Bosanquet, J., says, "It has been decided to be an offence to compromise a penal action which had not actually been brought."

(*x*) *Attorney-General* v. *Allen*, Exch. Mich. Term, 1850. This criminal liability of a master for the acts of his servant in violating the revenue laws, recently received a forcible illustration in the informations (understood to amount to 120 or upwards) filed against the London Dock Company and the St. Katherine's Dock Company; the alleged severity of which proceeding produced a large meeting of influential merchants, &c., in the City of London, in December, 1851, at which a series of articles (as they were termed) were agreed upon, as the foundation of a proposed alteration in the law of customs. One of these articles, 7, was as follows: "Merchants, shipowners and others, should not be made responsible for the crimes or offences of their servants or crews, except where guilty knowledge, or the most culpable negligence, is clearly traced home to them." In December, 1852, a deputation from the Committee of London Merchants for Reform of Board of Customs waited on Lord Derby (then Prime Minister), with a memorial containing a series of resolutions, one of which (No. 10) was the same as article 7, above mentioned. And in the following year, by the Customs Consolidation Act, 1853," 16 & 17 Vict. c. 107, s. 213, power was given to the Commissioners of Customs to waive the forfei-

observed by Pollock, C. B., "be evaded with the utmost facility and impunity, and they would be reduced to a mere dead letter."

Anon. Dyer.

In an old case in Dyer (*y*), it appeared that the deputy of a customer in a creek of a port (in which case a deputy was to be made by the statute of the first year of Q. Eliz. c. 12 [c. 11, s. 8]), falsely concealed the custom of a merchant, and the customer himself, ignorant of this, certified by his oath the customs of the port into the exchequer, according to the false information of his deputy, and judgment was given for the Queen against the customer, who was held liable for the forfeiture of the treble value of the merchandize so customed, and to be fined and ransomed according to the statute 3 Hen. 6, c. 3. And in *Lane* v. *Cotton* (*z*), Holt, C. J., after citing the above case in Dyer, said, "And what is the reason thereof, but because the principal shall answer for his deputy."

Lane v. Cotton.

Attorney-General v. Siddon

Again, where (*a*) an excise officer discovered on the defendant's premises a quantity of tobacco, for which he requested to see the permit, and the defendant's servant said he had one, when in fact there was none, and ultimately produced a permit for the removal of different tobacco, and dated after the discovery by the officer, the defendant was held liable to an information for penalties, for harbouring and concealing tobacco without paying duty, although at the time of the discovery he was from home, and had been absent for some time previously. In giving judgment, Bayley, B., said, "This is a case in which to my mind the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant.

"This is not the ordinary case of a servant selling in his master's shop the articles in which the master deals, in which it is quite clear that he is acting within the ordinary scope of the authority which he has received from his master, and therefore that the act of the servant in making the sale is the master's act; upon which principle all the cases of libel have gone (*b*).

"Neither is this the case of an act done by a servant in the manufacture of articles which the master is himself to manufacture. There the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from his master. The authority which he receives from his master is an authority to make and manufacture, and the master is responsible for his conduct, *primâ facie*, as to the means he adopts in making and manufacturing.

ture of ships or boats having prohibited goods on board, if satisfied that they were on board without the knowledge or privity of the owner or master of such ship or boat, and without any wilful neglect, or want of reasonable care, on their parts. And similar power is given by "The Supplemental Customs Consolidation Act, 1855," 18 & 19 Vict. c. 96, s. 26.

(*y*) *Anon.* Dyer, 238 *b*.

(*z*) 12 Mod. 489.

(*a*) 1 Cr. & J. 220; *S. C.* 1 Tyr. 41; and see *Attorney-General* v. *Riddle*, 2 Cr. & J. 493.

(*b*) *R.* v. *Almon*, 5 Burr. 2686; *R.* v. *Gutch*, M. & M. 433.

"But this is a case certainly of a different description, and I agree with the distinction that was taken when it was argued, that this does not fall within the ordinary range of the cases of a servant's act being the master's act. But in order to form a judgment whether this is the master's act or not, and within the scope of the authority which ought to be considered as given by the master to the servant, you must look at the nature of the act, and see with what view that act was done, and the participation which the master had in anything to which that act referred.

"This is the case of a servant of a fraudulent master endeavouring by his own act to conceal his master's fraud, and to prevent the consequences which would otherwise fall upon the master in respect of that fraud. From the nature of the service in which the party is employed, and from the conduct of the master in his fraud, you may infer whether or no the servant had *primâ facie* an authority from the master; not perhaps specifically for the doing of this specific act, but for the purpose of doing that which, in the exercise of his discretion upon a moment of embarrassment, which the possession of an improper article might naturally create, the servant should think and deem to be best."

The learned Baron then went through the facts of the case, which, in his opinion, formed *primâ facie* evidence to show that the act of the servant was the act of the master, though, said he, "The master was certainly at liberty to have produced evidence for the purpose of rebutting that *primâ facie* case, but in the absence of any evidence to rebut that case, it was rightly left to the jury, and *the jury were bound to consider it as being the master's act.*"

R. v. *Dixon.*

So, where (*c*) a statute (*d*) for regulating the making of bread, enacted, that if any of the loaves authorized by that act to be made, should have in them any alum, &c., "every person offending therein" should be liable to certain penalties: it was held, that a master baker was liable to an *indictment* for supplying loaves containing lumps of crude alum, though his foreman proved that he was the person who made the bread.

R. v. *Dean.*

And where a statute (*e*) imposed a penalty on *every person* who should be concerned in the unshipping of any goods, the duties for which had not been paid, it was held (*f*) that *each partner* (*g*) of a firm, whose clerk had been guilty of a fraud by altering the blue book at the Custom House, (in which the amount of goods was entered for duty,) was liable to the penalty incurred through the act of their clerk, as they *derived a benefit* from his fraud, and produced no evidence to rebut the *primâ facie* evidence of knowledge on their part which arose from that circumstance.

(*c*) *R.* v. *Dixon*, 4 Camp. 12; *S. C.* 3 M. & S. 11; and see *R.* v. *Bradley*, 10 Mod. 156.

(*d*) 36 Geo. 3, c. 22.

(*e*) 3 & 4 Will. 4, c. 53, s. 44.

(*f*) *R.* v. *Dean*, 12 M. & W. 39.

(*g*) It would have been otherwise had the penalty been attached to each *offence*, and not to each party concerned, *ibid.*; and see *R.* v. *Clerk*, Cowp. 610.

Indictments for nuisances.

Again, masters are liable to indictments for public nuisances (*h*), such as carrying on offensive trades, committed by their servants, although their masters have nothing to do *personally* with the nuisance complained of. In such cases, also, if a master could shield himself from criminal responsibility on the ground that he personally had nothing to do with the carrying on the trade, the real offender might escape with impunity, and the public grievance remain unredressed. It has indeed scarcely ever been contended, that the master, in such cases, was not guilty on the ground that the nuisance was perpetrated through the agency of others (*i*); and where that objection has been taken, it has been speedily overruled.

R. v. *Medley.*

Thus, in *Rex* v. *Medley* (*k*), the chairman, deputy chairman and other directors of a gas company, and several persons employed by them in carrying on the works, were jointly indicted for a nuisance occasioned by conveying the refuse of the gas, &c. into the river Thames, whereby fish were destroyed, and the water rendered unfit to drink. On the part of the defendants it was contended that the directors of the company were not liable, as no criminal participation on their part, in the acts done by their workmen, was shown, and they did not even know what was done. But they were found guilty and fined, Lord Denman, C. J., saying it made no difference, that the directors were ignorant of what had been done, provided they gave authority to the manager to conduct the works. "It seems to me both common sense and law, that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."

R. v. *Great North of England Railway Company.*

And again, where a railway company (*l*) was indicted for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred by the Act of Parliament; and one of the grounds on which it was argued that the company was not liable to an indictment for a misfeasance committed by their servants was that the individuals doing the act might be indicted and punished. Lord Denman said: "We are told that this remedy is not required because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceed-

(*h*) In *Turberville* v. *Stampe*, 1 Lord Raym. 264, Holt, C. J., said, "If my servant throws dirt into the highway, I am indictable." See 1 Bl. Comm. 431; 2 Roy's Maxims, c. 44; *Hall's Case*, 1 Mod. 76; *R.* v. *Cross*, 3 Camp. 224; *Bush* v. *Steinman*, 1 B. & P. 407; *Reedie* v. *London and North-Western Railway Company*, 4 Exc. 244.

(*i*) See *R.* v. *Pedly*, 1 A. & E. 822, where a landlord was held liable to be indicted for a nuisance committed by his tenants, such nuisance being the inevitable result of the occupation, and the landlord receiving rent for that occupation. See, however, *Rich* v. *Basterfield*, 4 C. B. 783.

(*k*) 6 C. & P. 292.

(*l*) *R.* v. *Great North of England Railway Company*, 9 Q. B. 315. In *R.* v. *Pease*, 4 B. & Ad. 30, some of the members of a railway company were indicted together with their servants for a nuisance occasioned by the railway; and see *R.* v. *Scott*, 3 Q. B. 543.

ings. Of this there is no doubt. But the public knows nothing of the former, and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

Innkeeper's servant refusing to receive guests.

Upon similar principles it is conceived than an innkeeper might be rendered liable to an indictment for a refusal by his servant to receive a guest into the inn, if it were within the scope of the servant's employment to receive guests (*m*); or a tenant (whose landlord had reserved the game) might be proceeded against under the Game Act (*n*) if he employed another person to kill game (*o*).

As to servant's liability, post.

The master's liability to answer in a criminal suit for the act of his servant does not, however, by any means involve the exemption of the servant himself to answer criminally for his own acts. The question, however, as to how far the command of the master will justify the act of the servant will be more properly brought under consideration in a separate chapter.

When master exempt, on conviction of servant.

Since, however, this liability of masters to answer criminally for the illegal acts of their servants, might occasionally operate hardly upon masters by putting it in the power of wicked servants to subject their masters to penalties by their own *wilful* violation of the law, it is sometimes enacted, for the protection of masters, that servants *wilfully* transgressing the law shall themselves be subject to a penalty, and their master, upon conviction of his servant, shall be exempt from further criminal liability (*p*).

Fraudulent conviction quashed. *R.* v. *Gillyard.*

But where an act of Parliament, (*q*) which imposed various penalties on maltsters who should violate the provisions of the act, contained also a clause (*r*) for punishing, by summary proceedings before a magistrate, any workman, servant or labourer employed by or in the service of any maltster, who should, *maliciously* and with intent to injure such maltster, violate the provisions of the act; with a proviso that the maltster himself should still continue liable to the penalties imposed for violation of the act, unless he should forthwith prosecute such workman, &c. to conviction, and produce to the Commissioners of Excise a certificate of such conviction; and a maltster *fraudulently* procured the conviction of his servant for an

(*m*) See *R.* v. *Ivens*, 7 C. & P. 213, where the *master* refused to receive the guest. And as to that case, see *Fell* v. *Knight*, 8 M. & W. 269.

(*n*) 1 & 2 Will. 4, c. 32.

(*o*) See *Spicer* v. *Barnard*, 28 L. J., M. C. 176, which was the converse case; the tenant was held not liable for his servant killing rabbits, as he had a right to do so *himself*, and "qui facit per alium, facit per se."

(*p*) See, for instance, 7 & 8 Geo. 4, c. 52, s. 46; and see the provision in the Libel Act, 6 & 7 Vict. c. 96, s. 7, *ante*, p. 177.

(*q*) 7 & 8 Geo. 4, c. 52.

(*r*) Sect. 46.

offence under the act, with a view to protect himself from proceedings for the same offence, the Court of Queen's Bench granted a certiorari to remove, and quashed the conviction (*s*).

Master only liable where servant commits breach of a public duty binding on his master.

R. v. *Watts.*

And as the liability of a master to answer criminally for the acts of his servants presupposes, and is in fact founded upon, the violation of some *public* duty legally binding upon the master, it can, of course, only exist where such duty exists, and must cease when such duty ceases to be binding. And, therefore, where a vessel was sunk by accident in a navigable river, and without any default on the part of the owner or his servants, as the law does not ordinarily cast upon the owner of a vessel sunk under such circumstances the duty of using any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it, it was held that the owner was not liable to an indictment, or to an action at the suit of a party sustaining injury in consequence of a collision with the sunken vessel, for omitting to remove it or take precautions to prevent accidents (*t*).

IN CASES OF TORT—CIVILITER.

Master generally liable for torts of servant.

A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service (*u*). The maxims applicable to such cases being *Respondeat superior*, and that before alluded to, *Qui facit per alium, facit per se.* This rule, with some few exceptions, which will be hereafter pointed out, is of universal application, whether the act of the servant be one of omission or commission, whether negligent, fraudulent or deceitful, or even if it be an act of positive malfeasance or misconduct; *if it be done in the course of his employment*, his master is responsible for it *civiliter* to third persons (*x*). And it makes no difference that the master did not actually authorize or even know of the servant's act or neglect, for even if he

(*s*) *R.* v. *Gillyard*, 12 Q B. 527.

(*t*) *R.* v. *Watts*, 2 Esp. 675; see *Parnaby* v. *Lancaster Canal Company*, 11 A. & E. 223; *Brown* v. *Mallett*, 5 C. B. 599; *Hancock* v. *The York, Newcastle and Berwick Railway Company*, 10 C. B. 348; *White* v. *Crisp*, 10 Exc. 312; *Metcalfe* v. *Hetherington*, 11 Exc. 257; *Gibbs* v. *Liverpool Dock Trustees*, 26 L. J., Exc. 109; *S. C.* 1 H. & N. 439; *S. C.* in error, 27 L. J., Exc. 321; 3 H. & N. 164. And see *R.* v. *Barrett*, 2 C. & K. 343, where it was held that an engineer could not be convicted of manslaughter, on an indictment which did not allege a duty in him which he had neglected to perform.

(*u*) By the civil law the liability was confined to the person standing in the relation of *paterfamilias* to the wrongdoer, Dig. lib. 9, tit. 3. But by the English law the liability is more extensive.

(*x*) Story on Ag. 452; Paley on Ag. 294, 298, and cases there cited; Pothier on Oblig. by Evans, No. 456; see also the cases cited *post*, and *Philadelphia and Reading Railroad Corporation* v. *Derby*, 14 Howard's (Amer.) Rep. 468.

disapproved of or forbad it he is equally liable if the act be done in the course of the servant's employment (*y*).

And it is but reasonable that it should be so, for surely it is more just that he who selects a person as his servant, from a knowledge of or belief in his skill and care, and who can remove him for misconduct (*z*), and whose orders that servant is bound to receive and obey, should suffer for the misconduct of that servant, than that an innocent third person, who had not the opportunity of selection, or the power of removal and enforcing obedience to his orders, should be prejudiced by such misconduct.

Accordingly, numerous instances occur in which this principle of holding the master responsible *civiliter* for the tortious acts of his servants, has been acted upon and enforced (*a*).

Michael v. *Alestree.* Thus, where (*b*) the servants of A. brought a coach with two ungovernable horses into Lincoln's Inn Fields, to train them, and they being not to be managed ran upon the plaintiff, the master was held liable for the damage occasioned.

Jones v. *Hart.* So where (*c*) a pawnbroker's servant took a pawn, and when the pawner came and tendered the money to the servant, he

(*y*) So a landlord is liable for the acts of his broker, *Freeman* v. *Rosher*, 13 Q. B. 780; *Gauntlett* v. *King*, 3 C. B., N. S. 59. So a client is liable for the tortious act of his attorney in the conduct of a suit, and cannot shield himself from responsibility by ignorance of a particular act, nor under the principle hereafter noticed, that a person who employs a contractor is not liable for the acts of the contractor's servants, *Collett* v. *Foster*, 28 L. J., Exc. 612. In that case, Bramwell, J., expressed a great desire to limit the doctrine of respondeat superior, and to make the actual wrongdoer alone responsible.

(*z*) The mere power of removal, apart from the power of original selection, will not render the person who has it liable for the acts of persons whom he has power to remove, if they are not *his* servants, *Reedie* v. *London and North-Western Railway Company*, 4 Exc. 244; and see *Chilcot* v. *Bromley*, 12 Ves. 114; *Kelly* v. *Mayor, &c. of New York*, 1 Kernan's (Amer.) Rep. 432.

(*a*) Whether the act complained of amount to a misfeasance, negligence, or omission of duty is obviously a question of fact, and must in each case depend upon the particular circumstances of the case. See *Crofts* v. *Waterhouse*, 3 Bing. 319. The Judge at Chambers has a discretion as to granting an *order for particulars* of the plaintiff's claim, but as a general rule not to be departed from without grave reasons, will *not* grant one in an action for "running down" by defendant's servants, *Weeks* v. *Macnamara*, 3 H. & N. 568.

(*b*) *Michael* v. *Alestree*, 2 Lev. 172. In this case the action was brought against *both* master and servant; but it is better generally to sue only the master; *Whitamore* v. *Waterhouse*, 4 C. & P. 383; see also *Parsons* v. *Winchell*, 5 Cush. (Amer.) Rep. 592. Except, perhaps, in a case like *Stevens* v. *Midland Railway Company*, 10 Exc. 352, where the action failed against the master, but succeeded against the servant.

(*c*) *Jones* v. *Hart*, 2 Salk. 441; *Cary* v. *Webster*, 1 Str. 480; *Mead* v. *Hamond*, *Armory* v. *Delamirie*, 1 Str. 505.

said he had lost the goods, the master was held liable in trover. So where the servants of A., with his cart, ran against another cart, wherein was a pipe of sack, and overturned the cart and spoiled the sack, it was held that an action lay against A. And so where (*d*) a carter's servant ran his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence. In fact actions against masters for damages sustained by the negligent driving of their servants are so common, that it is unnecessary to multiply instances of the masters' liability in such cases.

Negligent driving by servant.

Again, where (*e*) the defendant's servants so negligently kept a *fire* lighted in his field, that it extended to and consumed the heath of the plaintiff, the defendant was held liable to an action for the injury, and Lord Holt observed, "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit."

Servant negligently lighting fire. *Turberville* v. *Stampe.*

Actions against carriers, whether by land (*f*) or wa- Actions

(*d*) *Jones* v. *Hart, ubi supra.*

(*e*) *Turberville* v. *Stampe,* Lord Raym. 264; *S. C.* 1 Salk. 13; 1 Comyns' Rep. 32. And see *Beaulieu* v. *Finglam,* 2 H. 4, fo. 18, pl. 6, cited 1 C. B. 586, note. But see also *Mackenzie* v. *M'Leod,* 10 Bing. 385, *post.* A person on whose property a fire *accidentally* begins is not now liable to an action at the suit of any person who may be injured thereby; see 6 Ann. c. 31, s. 6; 12 Geo. 3, c. 73; 14 Geo. 3, c. 78, s. 86; 7 & 8 Vict. c. 84, s. 1, and Schedule A., which acts are *general* law; *Richards* v. *Easto,* 15 M. & W. 251; *S. C.* 3 D. & L. 522. But where a fire is caused, or having been knowingly lighted is permitted to extend, *by negligence,* the master is still liable, *Filliter* v. *Phippard,* 11 Q. B. 347. And see instances of actions against railway companies for negligent management of their engines by their servants, whereby sparks flew out and caused fire. *Aldridge* v. *The Great Western Railway Company,* 3 M. & G. 515; *Piggott* v. *Eastern Counties Railway Company,* 3 C. B. 229; *Vaughan* v. *Taff Vale Railway Company,* 3 H. & N. 743; *S. C.* 28 L. J., Exc. 41.

(*f*) By the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, and The Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7, the liability of carriers *by land* is limited in certain cases. But by sect. 8 of the first-mentioned Act, it is provided, "That nothing in that Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever arising from the *felonious* acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." Felony by the carrier's servant is, therefore, a good answer to a defence under the Carriers Act. But mere suspicion is not enough, there must be evidence of felony sufficient to convict a servant of the carrier. See *Hinton* v. *Dibbin,* 2 Q. B. 646; *Butt* v. *Great Western Railway Company,* 11 C. B. 140; *Great Western Railway Company*

against carriers of goods,

ter (*g*), for loss or injury to goods intrusted to their care, also frequently involve a similar principle, since carriers are generally answerable for the honesty of their servants (*h*).

A carrier, however, is not answerable for loss of luggage entrusted to his servant to carry for *his* own private gain (*i*), or in defiance of a known course of business (*k*). Nor is a railway company liable for injuries arising from negligence of their servants, if by a special contract entered into by the consignor, all risk of damage, from whatever cause, is agreed to be borne by the consignor (*l*). But they may be liable even for such damage apparently excepted by the special contract, if such damage is caused by the gross negligence of their servants in stowing the goods (*m*); or since 17 & 18 Vict. c. 31, the Railway and Canal Traffic Act, if the court or judge trying the cause shall be of opinion that under the circumstances the conditions of the special contract exempting them from liability are unjust and unreasonable (*n*). Again, carriers have been held liable for goods delivered to their servant, notwithstanding a bye-law that they would not be liable unless booked, in the absence of evidence that they had provided means of booking (*o*).

and passengers.

Carriers of passengers also are responsible for injuries happening to them through the misconduct (*p*) of their drivers and

v. *Rimmell*, 18 C. B. 575; *S. C.* 27 L. J., C. P. 201; *Metcalfe* v. *London and Brighton &c. Company*, 27 L. J., C. P. 205, 333.

(*g*) See the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31. By the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 502, *et seq.*, the liability of shipowners is limited in certain cases to the value of the ship and freight. See *Brown* v. *Wilkinson*, 15 M. & W. 391; *Leycester* v. *Logan*, 26 L. J., Ch. 306; *Cope* v. *Doherty*, 27 L. J., Ch. 600.

(*h*) Sub-contractors' servants are "servants in the employ" of the carrier within s. 8 of the Carriers Act, *supra*, note (*f*); *Machu* v. *South-Western Railway Company*, 2 Exc. 415; and see *Crouch* v. *Great Western Railway Company*, 26 L. J., Exc. 418, 422.

(*i*) *Butler* v. *Basing*, 2 C. & P. 613.

(*k*) *Slim* v. *Great Northern Railway Company*, 14 C. B. 647.

(*l*) *Austen* v. *Manchester, &c. Railway Company*, 10 C. B. 454; *Carr* v. *Lancashire, &c. Railway Company*, 7 Exc. 707; *Phillips* v. *Edwards*, 28 L. J., Exc. 52. But see *M'Manus* v. *Lancashire and Yorkshire Railway Company*, 28 L. J., Exc. 353, where such a provision was held unreasonable. As to a railway company limiting their liability to their own line, see *Fowles* v. *Great Western Railway Company*, 7 Exc. 699.

(*m*) *Phillips* v. *Clark*, 26 L. J., C. P. 168.

(*n*) *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, 28 L. J., Exc. 353.

(*o*) *Great Western Railway Company* v. *Goodman*, 12 C. B. 313; *Williams* v. *Great Western Railway Company*, 10 Exc. 15.

(*p*) *White* v. *Boulton*, Peake, 81. See generally on this subject, Selw. N. P. tit. "Carriers;" and see *Ross* v. *Hill*, 2 C. B. 877; *S. C.* 3 D. & L. 788, where a cab proprietor was held liable for the loss of a passenger's luggage, through the negligence of the driver; *acc. Powles* v. *Hider*, 6 E. & B. 207; *S. C.* 25 L. J., Q. B. 331. See also *Williams* v. *Cranston*, 2 Stark. 82, where a plaintiff, suing the servant, was nonsuited, on the ground that he ought to have sued the master; *Cavenagh* v. *Such*, 1 Price, 328, *acc.*

servants (*q*), but not of course if such injury happen by accident (*r*). Whether or not the injury complained of in any particular case arose from the negligence of servants, or was the effect of accident, would be a question proper for the consideration of a jury (*s*).

Actions against railway (*t*) and steam packet (*u*) companies, also necessarily involve similar principles, as such companies can only act through the instrumentality of servants (*x*).

Invasion by servant of right to ferry. *Huzzey* v. *Field.*

Where (*y*) the owner of a boat, which was accustomed to ply for hire and carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near

(*q*) A railway company, issuing a *through* ticket over its own and other lines, is liable to a passenger taking such ticket for negligence on another line, not a portion of theirs, see *Birkett* v. *The Whitehaven Junction Railway Company*, 28 L. J., Exc. 318; *Mytton* v. *The Midland Railway Co.*, 28 L. J., Exc. 385. This is on the ground that the *contract* to carry was made with *them*.

(*r*) *Crofts* v. *Waterhouse*, 3 Bing. 321; *Bradley* v. *Waterhouse*, M. & M. 154.

(*s*) See *Briddon* v. *Great Northern Railway Company*, 28 L. J., Exc. 51, where a train was detained by snow.

(*t*) Such as *Muschamp* v. *Lancaster and Preston Junction Railway Company*, 8 M. & W. 421; *Crouch* v. *North-Western Railway Company*, 2 Carr. & K. 789; *Smith* v. *Brighton Railway Company*, 7 C. B. 782; *Richards* v. *The Same Company*, 7 C. B. 839; *Chilton* v. *Croydon Railway Company*, 16 M. & W. 212; *Eastern Counties Railway Company* v. *Broom*, 6 Exc. 314; *Great Northern Railway Company* v. *Shepherd*, 8 Exc. 30; *Butcher* v. *South-Western Railway Company*, 16 C. B. 13; *Stevens* v. *Midland Railway Company*, 10 Exc. 352; *Whitfield* v. *South-Eastern Railway Company*, 27 L. J., Q. B. 229; *S. C.* 1 E. B. & E. 115. As to liability of railway company for negligence of their servants where damage arose through defective fences, see *Midland Railway Company* v. *Daykin*, 17 C. B. 126; see also *Giles* v. *Taff Vale Railway Company*, 2 E. & B. 822.

(*u*) *Fenton* v. *City of Dublin Steam Packet Company*, 8 A. & E. 835; *Bennett* v. *Peninsular and Oriental Steam Navigation Company*, 6 C. B. 775.

(*x*) And see *Maund* v. *The Monmouthshire Canal Company*, 4 M. & G. 452, where the defendants were held liable in trespass for the act of their servant. In *Chilton* v. *Croydon Railway Company*, 16 M. & W. 212, and *Eastern Counties Railway Company* v. *Broom*, 6 Exc. 314, it was held that railway companies might be liable to an action of trespass for an assault committed by their servant. See also *Whitfield* v. *South-Eastern Railway Company*, 27 L. J., Q. B. 229; *S. C.* 1 E. B. & E. 115; *Green* v. *London General Omnibus Co.*, 29 L. J., C. P. 13; and the American cases of *Moore* v. *Fitchbourg Railroad Corporation*, 4 Gray, 465; *The Philadelphia, &c. Railroad* v. *Quigley*, 21 Howard's Rep. 202.

(*y*) *Huzzey* v. *Field*, 2 C. M. & R. 432. Where the lessee by parol of a ferry, finding it did not answer, agreed to become servant to the lessor and account to him for the profits of the ferry, his interest as tenant was held to have been surrendered by operation of law, *Peter* v. *Kendal*, 6 B. & C. 703. In *Blackwell* v. *Wiswall*, 24 Barbour's (Amer.) Rep. 355, the lessor of a ferry was held not liable for the acts of lessee's servants.

the line of an ancient *ferry*, and paid the fare over to his master, it was held that the servant was acting at the time in the course of his master's service, and for his master's benefit, and the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.

Fraud of servant.

And a master is liable for the *fraud* of his servant, committed in the course of his master's business, and within, but, as we shall hereafter see, not beyond the scope of his authority. Thus, if a goldsmith make plate, wherein he mingles dross, so that it is not according to the standard, and send his servant to a fair to sell it, who sells it for good plate according to the standard, an action upon the case lies against the master (*z*).

Upon this principle an attorney has been compelled by the court to pay costs occasioned by his clerk fraudulently simulating the seal of the court, upon a writ (*a*), Jervis, C. J., remarking, "There are many acts of a servant for which, though criminal, the master is civilly responsible by action."

Servant enabled to commit fraud by master's negligence.

It has, however, been held in the House of Lords (*b*), that negligence of trustees of a corporation, in leaving the corporate seal in the hands of the secretary, whereby he was enabled fraudulently to affix it to five powers of attorney for the transfer of stock belonging to the corporation, did not prevent them from saying that the powers of attorney were forged, and suing the Bank for not transferring the stock on their subsequent application. In giving the opinion of the judges to the House of Lords in that case, Lord Wensleydale said, "If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal."

Master's liability extends to persons not immediately employed by m, if they e *his* servants.

The rule that a master is responsible for the acts of his servants applies, not only to domestic servants who may have the care of carriages, horses and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the *immediate* employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he

(*z*) *Southern* v. *How*, Cro. Jac. 471; and see *Grammar* v. *Nixon*, 1 Str. 653; *Hern* v. *Nicholls*, 1 Salk. 289; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Fuller* v. *Wilson*, 3 Q. B. 58; *Jones* v. *Downman*, 4 Q. B. 235, note; *Downman* v. *Williams*, 7 Q. B. 103; *Watson* v. *Earl Charlemont*, 12 Q. B. 856; *Coleman* v. *Riches*, 16 C. B. 104; *Ranger* v. *Great Western Railway Company*, 5 Ho. Lords Cases, 72; *Re British Bank*, 28 L. J., Ch. 257; Story on Ag. s. 264. As to the master's liability to an action *on the warranty*, see *ante*, p. 161.

(*a*) *Dunkley* v. *Ferris*, 11 C. B. 457.

(*b*) *Bank of Ireland* v. *Trustees of Evans' Charities*, 5 Ho. Lords Cas. 389. The secretary had been convicted of the forgery.

desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. The same principle prevails if the owner of a farm has it in his own hands, and does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner and selected by himself, or by a person specially deputed by him; if any damage happen through their default the owner is answerable, because their neglect or default is his, as they are appointed by and through him (*c*). So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner. These under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer (*d*).

Wayland v. *Elkins.*

Upon this principle it was that the defendant was held liable in *Wayland* v. *Elkins* (*e*) for damage done to the plaintiff's house by a waggon being driven against it. The defendant and one D. were carriers from London to Gosport, and by an arrangement between them D. horsed the waggon from London to Farnham, and the defendant then conducted it from Farnham to Gosport. At the time the mischief happened the waggon was drawn by D.'s horses, and was driven by a servant of D. who had been hired by and received his wages from D., and with whose employment the defendant had no concern whatever, but the waggon was the property of the defendant; and Gibbs, C. J., held that the action might be maintained "upon this principle: the waggon belongs to Elkins, and he receives the profits derived from the use of it. On what terms he engages with D. we do not know, but being jointly entitled with D., and since it is no objection that D. had not been joined, the case is the same as if Elkins had received all the profits. Then since the waggon was to be drawn for the benefit of Elkins, the servant to all legal purposes was the servant of Elkins, although for inferior purposes, and as between the parties he may be considered as the servant of D."

Randleson v. *Murray.*

To the same principle may also be referred the case of *Randleson* v. *Murray* (*f*), though that case is sometimes placed

(*c*) See *R.* v. *Hoseason*, 14 East, 605.

(*d*) *Per* Littledale, J., in *Laugher* v. *Pointer*, 5 B. & C. 554; and see *per* Mullett, J., in *Blake* v. *Ferris*, 1 Seld. (American) Rep. 58. In *Stone* v. *Cartwright*, 6 T. R. 411, it was held that the agent of a colliery, belonging to an infant, who was appointed manager by the Court of Chancery was *not* liable for damage caused by colliers hired by a bailiff employed under him to superintend the works. The action should have been against the infant; and see *R.* v. *Bleasdale*, 2 Carr. & K. 765, *ante*, p. 176.

(*e*) 1 Stark. 272; *S. C.* Holt, 227. See the Reporter's note at the end of the latter report.

(*f*) 11 A. & E. 109. It may well be doubted how far this *case* would be supported now.

with a different class of cases, those namely in which an owner of fixed property has been held responsible for the acts of persons not strictly speaking his servants (*g*). In that case the defendant, who was a warehouseman at Liverpool, had employed a master porter to remove some barrels of flour from his warehouse. The master porter used his own tackle, and brought and paid his own men, but employed a master carter to carry the barrels away, and the master carter brought his own carts and men, one of whom was the plaintiff. The master porter's tackle failed whilst being used by his men, a barrel fell and injured the plaintiff, and the defendant was held liable for the damage, on the ground that the men were in point of law his servants (*h*).

Wanstall v. *Pooley.*

And so where a corn-factor was absent from his shop, and, during his absence, his sister managed his business; she wanted to send out some corn to a customer, and for this purpose employed a person who occasionally worked for her brother, and who at the time of such employment was in a state of inebriety. This man, contrary to the practice of the corn-factor's shop, took out the corn on a small warehouse truck, which he negligently left on the road, whereby a person driving along in a chaise was injured: the corn-factor was held liable in an action at the suit of this person (*i*).

Upon this principle in America a railway company has been held liable for the acts of a contractor for a portion of their line, where in blasting rocks, pursuant to the contract, a stone was thrown upon and injured the plaintiff (*k*).

Master liable, though act of servant not necessary for proper performance of his master's orders.

And if a servant is *acting in the execution of his master's orders*, and by his negligence causes injury to a third party, the master will be responsible, *although the servant's act was not necessary* for the proper performance of his duty to his master, or was even contrary to his master's orders. Upon this subject nice questions often arise as to how far the servant *was* acting in his master's service at the time the injury was done: though the law is clear, it is sometimes difficult of application to particular cases. It is well illustrated by the following cases, in which the master was held liable.

Coachman

In an action (*l*) for the negligent driving of the defendant's

(*g*) As to those cases, see *Reedie* v. *London and North-Western Railway Company*, 4 Exc. 244, *post*, pp. 201, 207.

(*h*) A. and S. sold to P. a box in the loft of their store, and P. promised to send his porter for it. He did so, and, by permission of A. and S., the porter went up into the loft, and proceeded to lower the box by means of tackle belonging to A. and S. The box fell and injured the plaintiff: it was held in America that A. and S. were not liable. *Stevens* v. *Armstrong*, 2 Seld. 435 (1852).

(*i*) *Wanstall* v. *Pooley*, Q. B. M. T. 1841, 6 Cl. & F. 910, n.

(*k*) *Stone* v. *Cheshire Railroad Corporation*, 19 New Hampsh. Rep. 427; *Lowell* v. *Boston and Lowell Railroad Corporation*, 23 Pick. 24.

(*l*) *Croft* v. *Alison*, 4 B. & Ald. 590. In *Welsh* v. *Lawrence*, 2 Chit. 262, evidence that the chainstay of a cart broke, in consequence of which the horse ran away and plaintiff's horse was injured, was held to support an action for negligent driving by defendant's servant, as the master is bound to have good tackle.

coachman, whereby the plaintiff's carriage was upset: it appeared that the accident arose from the defendant's coachman striking the plaintiff's horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck the two carriages were entangled. The defendant was held liable for the damage caused by his servant's act, although wanton, as it was done in pursuance of his employment. And, *per Curiam:* "The distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes but *injudiciously*, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master *will be* liable, being an act done in pursuance of the servant's employment." striking another person's horses whilst driving his master. *Croft* v. *Alison.*

So, if a coachman were driving his master, and were ordered not to drive so fast, but he nevertheless continued to do so, and an accident occurred in consequence, the master would be responsible for the injury; for in that case the coachman would still be driving *for his master*, though driving badly (*m*). Coachman driving too fast.

So a master was held (*n*) liable for damage caused by the negligent driving of his cart in the city by his servant, although it was proved that the cart ought not, in carrying out his orders, to have been in the city at all; and Lord Wensleydale said:— "If the servant, being on his master's business, took a *detour* to call upon a friend, the master will be responsible. If you think the servant lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Servant making *detour* with master's cart. *Joel* v. *Morison.*

Again, a master was held (*o*) liable for damages caused by the negligent driving of his servant, who, after having set his master down, drove round to deliver a parcel of his own, and did not drive *directly* where he was ordered to go, Erskine, J., saying: "Evidence has been given that the master directed the servant to drive to the Red Lion, in Castle-street, but that the *Sleath* v. *Wilson.*

(*m*) 7 M. & G. 566; see *Sleath* v. *Wilson*, 9 C. & P. 612.

(*n*) *Joel* v. *Morison*, 6 C. & P. 501. And see *Booth* v. *Mister*, 7 C. & P. 66, where a master was held liable for damage caused by his cart, which was entrusted to his servant, but which another person, *a friend of the servant, was driving* when the accident happened; Lord Abinger saying he thought that as the defendant's servant was in the cart, the reins being held by another man made no difference. See also *Wheatley* v. *Patrick*, 2 M. & W. 650.

(*o*) *Sleath* v. *Wilson*, 9 C. & P. 607; *S. C. nomine Heath* v. *Wilson*, 2 M. & Rob. 181.

servant improperly drove to the Old Street road to deliver a parcel of his own; and the point has been put to the Court that, inasmuch as it is clear that the servant was not at that time engaged in his master's business, this action cannot be maintained. But I am of opinion that this action may be maintained. I think the law has been most properly laid down by Mr. Baron Parke in the case which has been cited (*p*). It is quite clear that if a servant without his master's knowledge takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable, and on this ground, that the master has not entrusted his servant with the carriage. But *whenever the master has entrusted the servant with the control of the carriage it is no answer that the servant acted improperly in the management of it* (*q*)."

Patten v. *Rea.*

Where the general manager of the defendant, a horse-dealer, had a horse and gig of his own, which he used for the defendant's business as well as his own, and was allowed to keep them on defendant's premises at his expense; and on one occasion the manager, on putting the horse into the gig, told defendant he was going to S. to collect a debt for him and afterwards to see his own doctor, and before he got to S. he ran the gig against and killed the plaintiff's horse; it was held that there was abundant evidence to make the defendant responsible, although he had not expressly requested the manager to use the horse and gig on that occasion. And it was also held that the proper question to leave to the jury, is, whether at the time of the act complained of, the servant was driving on his master's business and with his authority (*r*).

Master liable though injury immediately caused by stranger.

And a master has been held liable for damage done to a third person which would not have happened but for the negligence of the defendant's servant, although the *immediate cause* of the damage was *a stranger*.

Illidge v. *Goodwin.*

Thus, a master scavenger was held liable for injury caused by the negligence of his servant in leaving his cart and horse unattended in the street, although the immediate cause of the injury was a passer-by who struck the horse, which backed the cart into the plantiff's shop-window (*s*). In that case it was a misfeasance to leave the horse unattended (*t*).

Extent of masters liability.

Moreover a master is, generally speaking, liable for *all the consequences* arising from the misconduct of his servant, where an injury arises to a third person from such misconduct: though Pollock, C. B., entertains considerable doubt whether a man is responsible for all the *possible* consequences that may, under any circumstances, arise in respect of mischief which by no possibi-

(*p*) *Joel* v. *Morison, ubi supra.*

(*q*) So a landlord is liable for any irregularity committed by a broker whom he has authorized to distrain, if the broker has distrained the right goods, although the irregularity be committed without the knowledge or sanction of the landlord, *Haseler* v. *Lemoyne,* 28 L. J., C. P. 103. But not if he distrain the wrong goods, *Lewis* v. *Reed,* 13 M. & W. 834; or things not distrainable, *Freeman* v. *Rosher,* 13 Q. B. 780.

(*r*) *Patten* v. *Rea,* 2 C. B., N. S. 606; *S. C.* 26 L. J., C. P. 235.

(*s*) *Illidge* v. *Goodwin,* 5 C. & P. 190.

(*t*) See 3 E. & B. 153.

lity could he have foreseen, and which no reasonable person, under any circumstances, could be called upon to have anticipated (*t*).

Master not responsible for servant's acts beyond scope of his authority.

A master, however, is *not responsible* for the wrongful act of his servant unless that act be done in the execution of the authority given by his master (*u*). *Beyond the scope of his employment* he is as much a stranger to his master as any third person, and, therefore, his act cannot be regarded as the act of his master.

M'Kenzie v. *M'Leod*.

Upon this principle it was held, in *M'Kenzie* v. *M'Leod* (*x*), that a master was not liable for the act of his housemaid in lighting furze and straw with a view to clean a chimney which smoked, whereby the house was burnt down, as she was merely employed to light the fire, and others were employed to clean the chimney, and, moreover, she had been expressly cautioned not to attempt to clean the chimney in that way; the court considering that in acting as she did she was acting beyond the scope of her employment, which was merely to light the fire.

Lyons v. *Martin*.

Again, in *Lyons* v. *Martin* (*y*), a master was held not liable for an unlawful act committed by his servant, who was authorized to distrain cattle damage feasant on his land, in *driving the plaintiff's horses*, which were on the highway, *on to* his master's land and then distraining them, as the doing so was not within the scope of his authority; and Patteson, J., said, "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he *wilfully* does an illegal one."

Goodman v. *Kennell*.

So if a man sends his servant on an errand without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is not responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority (*z*).¶

Lamb v. *Palk*.

And where (*a*) the plaintiff's van, which had brought mineral water to the back entrance of the plaintiff's premises, was unloading, and the plaintiff's gig standing behind it, when the defendant's coachman, with a carriage and pair of horses, came up from the mews into the street, and the carriage being unable to pass the van for want of room, was obstructed for five minutes, when the defendant's coachman got off his box and took hold of the head of the horse which was in the van, in order to remove the van, this caused the van to move, and a case of mineral water that a person was taking from the van fell down on the shafts of the plaintiff's gig, and broke them: it was held that the defendant was not responsible for the damage done, as

(*t*) *Greenland* v. *Chaplin*, 19 L. J., N. S., Exc. 293; see *Rigby* v. *Hewitt*, *ib.* 291.

(*u*) *Middleton* v. *Fowler*, 1 Salk. 282; *Croft* v. *Alison*, 4 B. & Ald. 590; *Lamb* v. *Palk*, 9 C. & P. 629; *M'Manus* v. *Crickett*, 1 East, 106; see *Garth* v. *Howard*, 8 Bing. 451, *ante*, p. 163.

(*x*) 10 Bing. 385.

(*y*) 8 A. & E. 512.

(*z*) *Goodman* v. *Kennell*, 3 C. & P. 167.

(*a*) *Lamb* v. *Lady Elizabeth Palk*, 9 C. & P. 629.

the coachman was not acting in the employ of his mistress at the time the matter occurred.

Mitchell v. *Crasweller.*

So where the defendant's carman, having finished the business of the day, returned to their shop in Welbeck Street with their horse and cart, and got the key of the stable, which was close by, but instead of going there at once and putting up the horse as it was his duty to do, he, without his master's knowledge or consent, drove a fellow-workman to Euston Square, and in his way back ran over and injured the plaintiff; it was held, that inasmuch as the carman was not at the time of the accident engaged in his master's business, they were *not* responsible for the consequences of his unauthorized act (*b*). And Maule, J., said, "The master is liable, even though the servant in the performance of his duty, is guilty of a deviation or a failure to perform it, in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

The principle upon which these cases were decided is further illustrated by the following American case (*c*) :—

Wright v. *Wilcox.*

The defendant's servant was driving his waggon and team, and the plaintiff's son (a boy on his way to school), asked for a ride. The servant said he might when they got up the hill he was then ascending. When the hill was ascended, the lad took hold of the side of the waggon, between the front and hind wheels. The driver did not stop. He was cautioned by a bystander, that if he did not stop he would kill the boy. He looked behind him. The horses were walking, and the driver seeing the plaintiff's son and other boys attempting to get on the waggon, cracked his whip, and put the horses into a trot. The plaintiff's son fell, and the hind wheel went over and injured him: it was held, that as the driver whipped the horses, intending to throw the boy off, this was a wrong on the part of the servant, for which the master was *not* liable, any more than he would have been for an assault committed by the servant.

Grant v. *Norway.*

So, if a master of a ship sign a bill of lading for goods which have never been shipped (*d*); or a wharfinger's servant fraudulently sign a receipt, purporting to be an acknowledgment that certain goods have been delivered at his master's wharf to be shipped, no such goods having in fact been delivered (*e*); neither the wharfinger in one case, nor the shipowner in the other, will be bound by such act of their servant. In neither case was

Coleman v. *Riches.*

(*b*) *Mitchell* v. *Crasweller*, 13 C. B. 237. It was held in this case, that under "not guilty" the defendants might show that the driver was not at the time of the accident acting as their servant.

(*c*) *Wright* v. *Wilcox*, 19 Wendell's Rep. 343, following *M'Manus* v. *Crickett.*

(*d*) *Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 8 Exc. 330.

(*e*) *Coleman* v. *Riches*, 16 C. B. 104.

there any actual authority to do the act complained of, nor did the facts warrant the inference of an implied authority.

And if one employ another to do an act which may be done in a lawful manner, but the latter in doing it commit a public nuisance, the employer is not responsible (*f*). When master not liable for illegal act of servant.

If a servant maliciously, and without reasonable and probable cause, indict another for stealing his master's goods, the master would not be liable to an action for malicious prosecution (*g*). Malicious prosecution.

Nor is a master responsible for injury caused by his servant's negligence *to a person who might*, by the exercise of *ordinary care, have avoided* the consequences of the servant's negligence (*h*). It is not, however, sufficient, in order to exempt a master from responsibility, to show that the party injured did, by his own act, *contribute* to the injury; but it must be shown that he did not use ordinary care to avoid the consequences of the servant's negligence (*i*). Whether or not the party injured *did* use ordinary care would be a question proper for a jury to decide, taking into consideration all the circumstances of the case (*k*). But if he did not, he would have no right to recover compensation from the defendant for what, properly speaking, was the effect of *his own* want of caution. Nor if person injured *omit* to use *ordinary care.*

Therefore, in an action (*l*) by a passenger in the train of one railway company against another company, with a train belonging to which a collision had taken place, whereby the plaintiff was injured, a plea by the defendants, that the injury was caused *in part* by the negligence of the persons who had the care of the train in which the plaintiff was riding, was held bad, as it was consistent with all the facts stated in it that the plaintiff, or those who had the charge of the train in which he was riding, could not by the exercise of ordinary care have avoided the consequences of the defendant's negligence. And Lord Wensleydale said: "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (*m*); and that rule is, that although there may have been negligence on *Bridge* v. *Grand Junction Railway Company.*

(*f*) *Peachey* v. *Rowland*, 13 C. B. 182.

(*g*) *Stevens* v. *Midland Railway Company*, 10 Exc. 352; *S. C.* 23 L. J., Exc. 328.

(*h*) So, *e converso*, a master cannot recover against a third person for damage which has arisen through his own servant's negligence, *Pardington* v. *South Wales Railway Company*, 26 L. J., Exc. 165; *Ellis* v. *South-Western Railway Company*, 2 H. & N. 424; *S. C.* 26 L. J., Exc. 349. In *Gough* v. *Bryan*, 2 M. & W. 770, a plea that the damage complained of was caused by the negligence of the plaintiff's servant, was held bad as amounting to the general issue. See 11 M. & W. 313. But see also *Caswell* v. *Worth*, 5 E. & B. 849, where a plea, that the plaintiff wilfully set in motion the machinery for an injury caused by which the action was brought, was held good; but the objection that it amounted to the general issue does not appear to have been taken.

(*i*) *Butterfield* v. *Forrester*, 11 East, 60; and see *Clayards* v. *Dethick*, 12 Q. B. 439.

(*k*) *Ellis* v. *South-Western Railway Company*, *ubi supra.*

(*l*) *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244; acc. in America, *Center* v. *Finney*, 17 Barbour's Rep. 95.

(*m*) *Ubi supra.*

the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover: if by ordinary care he might have avoided them he is the author of his own wrong."

Davies v. *Mann.*

The same principle was again acted upon in the case of *Davies* v. *Mann* (*n*), were a master was held liable for the negligence of his waggoner, who had driven over and killed the plaintiff's ass, which was wrongfully left fettered in the public road; for although the plaintiff was negligent in leaving his donkey there, yet the donkey's being there was not the *immediate* cause of the injury.

Tuff v. *Warman.*

And in the case of *Tuff* v. *Warman* (*o*), in the Exchequer Chamber, Wightman, J., in delivering judgment, said:— "The proper question for the jury in cases of this kind is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter, not, as but for his own misconduct the misfortune would not have happened. Mere negligence, or want of ordinary care or caution, would not, however, have disentitled him to recover unless it was such that but for the negligence and want of ordinary care and caution the misfortune would not have happened, or if the defendant might by the exercise of caution on his part have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the judges in the cases of *Butterfield* v. *Forrester*, *Bridge* v. *The Grand Junction Railway Company*, *Davies* v. *Mann*, and *Dowell* v. *The General Steam Navigation Company*."

Passenger in public conveyance identified with driver.

And this principle, of holding a master not responsible for damage done by his servant to a person who might by the exercise of ordinary care have avoided the damage, was in one case extended so far as to hold that a passenger in a public conveyance could not recover damages for an injury sustained in consequence of the negligence of the driver of another conveyance against the owner of *that* conveyance, if the persons having the conduct of the conveyance *in which he is a passenger* could by the exercise of ordinary and reasonable care have avoided those consequences; but that his remedy in such case is against the person conveying him, or that person's servants: thus identifying to a certain extent the passenger and the driver of a public conveyance. It may, indeed, be doubted (*p*) how

(*n*) 10 M. & W. 546; see also *Morrison* v. *The General Steam Navigation Company*, 8 Exc. 730; *Dowell* v. *Same Company*, 5 E. & B. 195; *S. C.* 26 L. J., Q. B. 59.

(*o*) 27 L. J., C. P. 322; *S. C.* in the court below, 26 L. J., C. P. 263; 2 C. B., N. S. 740; and see *Senior* v. *Ward*, 28 L. J., Q. B. 139.

(*p*) See 1 Smith's L. C. 132 *a*; *Rigby* v. *Hewitt*, 5 Exc. 240; *S. C.* 19 L. J., N. S., Exc. 291; *Greenland* v. *Chaplin*, 5 Exc. 243;

far the case in which this decision was arrived at will be supported; but even if it is supported, the consequences will not be very important in a practical point of view, as it only goes to the question who is the proper party to be responsible in each case; that the party injured has his remedy against some one still remains perfectly clear.

Thorogood v. *Bryan*.

The case above alluded to is *Thorogood* v. *Bryan* (*q*), which was an action against an omnibus proprietor to recover damages for the negligence of her servant, who had caused the death of the plaintiff's husband (*r*) by knocking him down and driving over him as he had just alighted from another omnibus. The deceased was a passenger in an omnibus belonging to B., and the defendant was owner of another rival omnibus running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. Deceased, wishing to alight, did not wait for the omnibus to draw up at the kerb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, deceased was unable to get out of the way, was knocked down and run over, and shortly after died of the injuries so sustained. But it was held by the Court of Common Pleas that the defendant was not liable to make compensation for the consequences of her servants' negligence, as there appeared to have been negligence on the part of the driver of the omnibus in which the deceased was a passenger; and, *for the purposes of that action*, the passenger must be considered as identified with the person having the management of the omnibus he was conveyed by. Upon this case, however, it may be observed that the passenger, at the time the accident happened, *had left* his omnibus; and, moreover, that he had left it under circumstances which showed a want of ordinary care on his *own* part (*s*). This would seem to be sufficient ground for supporting the *decision* in that case, even should the judgment, identifying the driver with the passenger, be considered erroneous.

Child identified with person taking charge of it.

Waite v. *North-Eastern Railway Company*.

Where the plaintiff, a child of five years old, was under the care of his grandmother, who purchased tickets for both from A. to B., on the defendants' railway, and while crossing the line at A. to be ready for their train, they were both knocked down and injured by another train; the accident was partly owing to the defendants' negligence, but there was also such negligence on the part of the grandmother as would have prevented her from recovering against the defendants; it was held by the Court of

S. C. 19 L. J., N. S., Exc. 293. It is observable that in the case alluded to in the text (*Thorogood* v. *Bryan*), none of the cases were cited in which a master has been held *not responsible* for the act of one whom he *did not select* to discharge the duty he was discharging at the time an accident happened, such as *Quarman* v. *Burnett*, *Rapson* v. *Cubitt*, &c., see these cases, *post*.

(*q*) 8 C. B. 115.

(*r*) The action was brought under the statute 9 & 10 Vict. c. 93.

(*s*) See the case put by Coleridge, J., in *Woolf* v. *Beard*, 8 C. & P. 374, 375.

Queen's Bench, and affirmed by the Exchequer Chamber, that there was a complete identification of the plaintiff with the grandmother, and that by reason of her negligence the action in his name could not be maintained (*t*).

Where person injured is incapable of taking care.

But where the party injured was a child incapable of taking care of itself, and was not under the care of anyone who was capable of taking care of it, a master has been held liable for injury caused to the child by the negligence of his servant, although the child itself, by its own act, brought about the accident. Thus, where (*u*) a carman, who had charge of a cart, went into a house and left the horse and cart standing at the door, without anyone to take care of them, for about half-an-hour, and during his absence a child, under seven years of age, got upon it, and another boy led the horse on, whereby the child was thrown down, run over, and his leg broken: it was held that the carman's master was liable for the damages sustained by the child, although the child was a trespasser and contributed to the mischief by his own act; the jury having found that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse.

Lynch v. *Nurdin.*

Who is the master of the servant doing the damage?

The difficulty, however, which arises in cases of this sort is not so much in ascertaining the law as in applying it to the circumstances of each particular case, and ascertaining *who is* to be regarded as *the master* in each case, for it is obvious that the liability arising from the relationship of master and servant cannot exist unless the relationship itself exist (*x*). In all cases, therefore, of injury by the act of a servant, it is most important to ascertain in the first place *whose servant* the person was who *caused the injury*. And this is an inquiry of greater difficulty than would at first be imagined, and frequently involves questions of considerable nicety. For instance, in the ordinary case of a person hiring a carriage, horses and driver (*y*) on a job, although it is now settled that, if in such a case any accident or injury happen to a third person through the carelessness or misconduct of the driver, the hirer is not, in general (*z*), liable to make compensation for such injury, yet there was formerly considerable doubt upon the subject, and some of the judges

Coachman, with carriage or horses on job, not servant of hirer.

(*t*) *Woite* v. *North-Eastern Railway Company*, 27 L. J., Q. B. 417; 28 L. J., Q. B. 258.

(*u*) *Lynch* v. *Nurdin*, 1 Q. B. 29. But see *Lygo* v. *Newbold*, 9 Exc. 302.

(*x*) In *Stables* v. *Eley*, 1 C. & P. 614, a person who had formerly been in partnership with another man was held liable to an action on the case for injury caused by the negligent driving of the carter of that other, after the dissolution of the partnership, as his *name was on the cart* that did the damage. And in *M'Kone* v. *Wood*, 5 C. & P. 1, a man was held liable to an action for keeping a mischievous dog, when the dog belonged to a person who had formerly been his servant, and had been seen about his premises.

(*y*) If the horses are driven by the servant of the hirer he would be liable, *Sammell* v. *Wright*, 5 Esp. 263.

(*z*) The hirer *may* make himself liable by ordering, sanctioning, or adopting the act of the driver, *M'Laughlin* v. *Prior*, 4 M. & G. 48, *post*, p. 213; *Burgess* v. *Gray*, 1 C. B. 578, *post*, p. 203.

expressed opinions that the hirer *was* responsible, as being the *dominus pro tempore* (*a*); and he certainly is, in some respects, the master, for he may order the carriage to be driven where he pleases. The question was argued at great length in *Laugher* v. *Pointer* (*b*), where the owner of a carriage hired for the day, of a livery-stable keeper, a pair of horses and a driver, through whose negligence an injury was done to the plaintiff's horse; and the question was, whether the owner of the carriage, or the livery-stable keeper who supplied the horses and driver, was liable to make compensation for the injury. The judges before whom the case was argued, differing in opinion, they all gave separate and very elaborate judgments, which, as observed by Mr. Justice Story, in his valuable work on Agency (*c*), "have exhausted the whole prior learning on the subject, and on that account should be attentively studied:" The Lord Chief Justice, afterwards Lord Tenterden, and Mr. Justice Littledale, holding that the owner of the carriage was not liable; and Bayley and Holroyd, JJ., holding that he was. The point was thus left unsettled, for not only the Court of Queen's Bench but the twelve judges differed upon it (*d*). It again arose, and was definitively settled in *Quarman* v. *Burnett* (*e*), in which the Court of Exchequer, after fully considering the judgments given in *Laugher* v. *Pointer*, thought the weight of authority and legal principle was in favour of the

Laugher v. *Pointer.*

Quarman v. *Burnett.*

(*a*) See *per* Heath, J., in *Bush* v. *Steinman*, 1 B. & P. 409. The owner may maintain trespass for injury to them, *Dean* v. *Branthwaite*, 5 Esp. 35. Where A. hired B.'s servant to thatch for him, with B.'s assent, B. was held liable for *negligence* of the servant. But semble, he was not for *incompetence*, *Holmes* v. *Onion*, 2 C. B., N. S. 790; *S. C.* 26 L. J., C. P. 261.

(*b*) 5 B. & C. 545. And see *Chilcot* v. *Bromley*, 12 Ves. 114, where Sir W. Grant held that a job coachman supplied with carriage and horses, was not a servant of the person to whom they were supplied, although he paid the coachman board wages, as the contract was with the job-master, and the coachman was a *subject* of the contract, not a *party* to it.

(*c*) Sect. 453 b.

(*d*) See *per* Lord Wensleydale, in *Quarman* v. *Burnett*, 6 M. & W. 507. In *Brady* v. *Giles*, 1 M. & Rob. 494, where a similar question arose in an action on the case, Lord Abinger, C. B., left it to *the jury* to say whether the postilions were acting as the servants of the owner of the chaise, or of the hirer, and said it always appeared to him that the Queen's Bench pursued an erroneous course in *Laugher* v. *Pointer*, when they allowed the question to be discussed as a question of law. And see *M'Laughlin* v. *Prior*, 4 M. & G. 48, *post*, p. 213.

(*e*) 6 M. & W. 499. And see *Fenton* v. *The City of Dublin Steam Packet Company*, 8 A. & E. 835, where the owner of a ship, who let it by charter-party, whereby he agreed to find seamen, was held liable for their negligence, and *Dean* v. *Hogg*, 10 Bing. 345; *Dalyell* v. *Tyrer*, 28 L. J., Q. B. 52. See also *Rex* v. *Haydon*, 7 C. & P. 445, where it was held that the driver of a glass-coach, having stolen a purse from the hirer, could not be convicted of larceny *as a servant*, so as to be liable to the punishment for the aggravated offence under 7 & 8 Geo. 4, c. 29, s. 46, but he was guilty of simple larceny only.

view taken by Lord Tenterden and Mr. Justice Littledale, and decided accordingly, that the hirer was *not* liable. And it was also held, that the facts that the hirer always had the same driver, who was the only one his master kept, and always gave him a fixed gratuity and provided him with a livery, which he kept in the hirer's hall, and while he was hanging up which the accident happened, made no difference in the hirer's liability.

Persons employing contractor not liable for acts of *his* workmen.

The principle upon which *Quarman* v. *Burnett* (*e*) was decided has been frequently applied to other cases, in which a man has employed a person, carrying on a distinct trade or calling, to perform certain works for him, and an injury has been caused through the unskilfulness, negligence or default of the workmen employed by that person (*f*). In such a case, the workmen are selected and employed by the *contractor*, and it would be obviously unjust to hold *his* employer, who had nothing to do with the selection of the workmen, liable for the consequences of their unskilfulness or negligence. To make the primary principal or employer responsible in such cases would, as observed by Mullett, J., in *Blake* v. *Ferris* (*g*), be to push the doctrine of *respondeat superior* beyond the reason on which it is founded. The test generally is, whether or not the employer retained the power of controlling the work (*h*). If he has parted with the *whole control*, he is not in general liable.

If he has parted with whole control.

Butcher employing Smithfield drover.

Milligan v.

Thus, where a butcher bought a bullock in Smithfield Market, and employed a licensed drover to drive it home, and the drover employed a boy, through whose negligence the bullock injured the plaintiff's property; it was held, that the butcher was not liable, as the drover exercised a distinct calling, and the boy who caused the mischief was *his* servant, not the servant of the butcher (*i*). And so where a builder was employed to make certain alterations at a club-house, including the pre-

(*e*) Upon analogous principles, (somewhat governed by the law maritime,) it has been held that the master of a general ship is not liable to the owner of goods for damage done to them by the careless stowage of a stevedore appointed by the charterer, but paid by and to act under the captain's orders, the stevedore not being the servant of the master, *Blackie* v. *Stembridge*, 28 L. J., C. P. 329. Of course, however, the master *might* make himself liable for the stevedore's acts by interfering, *ibid.*

(*f*) An attorney is not such a contractor, therefore client is liable to an action of trespass if ca. sa. set aside, *Collett* v. *Foster*, 2 H. & N. 356; and see *Freeman* v. *Rosher*, 13 Q. B. 780.

(*g*) 1 Selden's (Americ.) Rep. 58.

(*h*) *Sadler* v. *Henlock*, 4 E. & B. 570, where a labourer, particularly skilful in making drains, was employed to cleanse a drain for the defendant, who paid him 5*s.* for the job, the defendant was held liable for injuries caused through such labourer's negligence. As to how far landlord is liable for the acts of men sent in to repair a well, see *Mills* v. *Holton*, 2 H. & N. 14.

(*i*) *Milligan* v. *Wedge*, 12 A. & E. 737. In this case, Littledale, J., stated that he retained the opinion he had expressed in *Laugher* v. *Pointer*; see *Martin* v. *Temperley*, 4 Q. B. 298, *post*, p. 206. And see also *R.* v. *Hey*, 2 Carr. & K. 983, where it was held that a drover was a bailee, and not a mere servant of the person who employed him, and therefore, that having sold some pigs

paration and fixing of certain gas-fittings, to do which he made a sub-contract with a gas-fitter, through the negligence of whom, or his servants, the gas exploded and injured the plaintiff, the builder was held not liable, as the relation of master and servant did not exist between him and the party causing the injury (*k*). So where a viaduct was being built by contractors for a railway company, under a deed, by which, amongst other things, it was provided that the contractors were to do the work, but the company had a general right of watching the progress, and if the contractors employed incompetent workmen, the company had the power of dismissing them: the company were held not liable for injuries sustained by a workman, who was killed by a heavy stone which fell from a travelling truck, through the negligence of some of the contractor's workmen, whilst building the viaduct, as the workmen, who caused the injury, were not the servants of the company; and the power reserved to them of dismissing incompetent workmen did not make them responsible for the consequences of the contractors employing such. And it was also held, that the defendants being the owners of the land on which the accident happened made no difference (*l*).

Rapson v. *Cubitt.*

Reedie v. *London and North-Western Railway Company.*

So again, commissioners of a navigation, who had entered into a contract with a person to do certain works, were held not liable for an injury arising from the imperfect performance of part of those works, as the contractor was not their servant (*m*).

Allen v. *Hayward.*

So in another case (*n*), where a railway company entered into a contract with A. to construct a portion of their line. A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for 40*l.* to erect a scaffold, which had become necessary in building the bridge; but it was agreed that B. was to provide the

Knight v. *Fox.*

entrusted to him and absconded with the money, he could not be convicted of larceny. He had no *original* intention of stealing the pigs.

(*k*) *Rapson* v. *Cubitt*, 9 M. & W. 710. See *Gayford* v. *Nicholls*, 9 Exc. 702; *Cuthbertson* v. *Parsons*, 12 C. B. 304. In *M'Keon* v. *Bolton*, 1 Ir. C. L. Rep. 279, a person employed to remove dust was held to be a servant, and not a contractor, and the employer was held liable for an accident caused by a heap left in the street.

(*l*) *Reedie* v. *London and North-Western Railway Company*, 4 Exc. 244; and see *Glover* v. *The Same Company*, 5 Exc. 66, where the defendants were held not liable in trover for the acts of a contractor's workman. See also *Steel* v. *South-Eastern Railway Company*, 16 C. B. 550.

(*m*) *Allen* v. *Hayward*, 7 Q. B. 960; see *Clayards* v. *Dethick*, 12 Q. B. 439. See also the American cases of *Lowell* v. *Boston and Lowell Railroad Corporation*, 23 Pick. 24; *Stone* v. *Cheshire Railroad Corporation*, 19 New Hamps. Rep. 427; *Blake* v. *Ferris*, 1 Seld. 49, 62 (1851); *Hilliard* v. *Richardson*, 3 Gray, 349 (1855), in the last of which are two elaborate judgments. *Kelly* v. *Mayor of New York*, 1 Kernan, 432 (1854).

(*n*) *Knight* v. *Fox*, 5 Exc. 721.

requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night and was injured; but it was held, that D. could not maintain an action against B. for the injury thus occasioned; even though, *after the accident*, B. had caused other lights to be placed near the spot to prevent a recurrence of similar accidents.

Overton v. *Freeman.*

Again, where certain commissioners (*o*) had contracted with A. for all the paving required in a certain district, and A. contracted with B. to lay down a certain portion of it, and B.'s workmen left some paving stones at night in such a position as to constitute a public nuisance, and the plaintiff tumbled over them whilst on foot; it was held, that A. was not liable to an action at the suit of the plaintiff, as the injury was not caused by *his* workmen.

Brig towed by steamer.

Sproul v. *Hemmingway.*

And similar principles were acted upon in a case which occurred in America (*p*). A brig, which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision; and the question was whether the owner of the brig was liable therefor. It was held, upon full argument, that he was not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig; were not appointed by him; did not receive their wages or salaries from him; had no power to order or control them in their movements, and had no contract with the master and crew of the steamboat, but only through the master with the owners of the steamboat for a participation in the power of the steamer, derived from the public use and employment thereof by the owners.

Employer of person doing unlawful act liable;

But if the act contracted to be done be in itself unlawful the original employers are responsible. As where the defendants, without having any power or authority to break up streets employed contractors to do it for the purpose of laying down gas pipes, and the plaintiff fell over a heap of stones left by the contractors and hurt herself, the defendants were held liable (*q*).

unless act might be done in lawful manner.

If, however, the act *may be* done in a *lawful* manner, the employer is not responsible if it is done in an *unlawful* manner, or so as to be a public nuisance (*r*).

Person em-

And where a contractor is employed, his employer may, by *personal interference* with the workmen, adopt their acts, and

(*o*) *Overton* v. *Freeman*, 21 L. J., C. P. 52; *S. C.* 11 C. B. 867.

(*p*) *Sproul* v. *Hemmingway*, 14 Pick. R. 71; see Story on Ag. 453 *c*, in a note to which is a long extract from the judgment of Chief Justice Shaw. See *Oakley* v. *Portsmouth and Ryde Steam Packet Company*, 11 Exc. 618.

(*q*) *Ellis* v. *Sheffield Gas Company*, 2 E. & B. 767; see *Sadler* v. *Henlock*, 4 E. & B. 570.

(*r*) *Peachey* v. *Rowland*, 13 C. B. 182; *S. C.* 22 L. J., C. P. 81.

so render himself liable, where, ordinarily, he would not be so. As in the case of *Burgess* v. *Gray* (*s*), in which it appeared that the defendant was the proprietor of some newly-built houses which he had employed P. to build for him, and P. in forming a drain from premises belonging to the defendant at the back of the new houses to the common sewer, had, by his servants, caused a quantity of gravel to be deposited by the roadside. The drain being finished, P. employed a person to carry away the gravel, and paid him so much a load, which he charged to the defendant, but the person so employed left some on the road, and the plaintiff, whilst driving in the evening along the road, ran upon the gravel left in the road, was upset, and injured. The defendant's attention had been called to the gravel left in the road by a policeman, and he had promised to remove it as soon as he could, and after the accident had said it was caused by the plaintiff's carelessness. On the part of the defendant it was, amongst other things, contended on the principle of *Quarman* v. *Burnett*, that he was not liable, as he had employed a contractor, but it was nevertheless held that under the circumstances of the case he *was* liable.

ploying contractor liable for personal interference.

Burgess v. *Gray*.

And unless a person who employs a contractor to do work for him has parted with the *whole control* of that work, he will still remain liable for the acts of that person and his workmen. In such case it must be assumed that he adopts all that is done in carrying on the work (*t*).

And unless he has parted with the whole control.

This liability of the master for the act of his servant, however, presupposes and is founded upon some obligation binding upon the master, either by contract or otherwise, to do or abstain from doing the act, the not doing or doing of which is complained of. A master cannot be liable for his servant omitting to do an act unless he himself was bound to do it. Nor again, can a master be liable for his servant doing an act which he himself was at liberty to perform, except, of course, in the case of a trust or license personal to the master.

Master not liable for servant's act when he would not be liable if he did it himself.

Where the plaintiff, who was an officer in the army, being about to leave London, sent his trunk to the house of the defendant (who was an upholsterer) for safe custody, and agreed to pay one shilling per week for house-room, and when the plaintiff returned he received the trunk, but the whole of the contents had been taken out and stolen, and the plaintiff brought an action against the defendant, charging him as bailee; Lord Kenyon held that the action could not be supported when it appeared that he had taken as much care of the plaintiff's goods as he had of his own, and said: "To support an action of this nature positive negligence must be proved. It has ap-

Finucane v. *Small*.

(*s*) 1 C. B. 578. The defendant in this case was held liable partly on the ground that it did not appear that he had parted with the whole control of the work, and partly on the ground that he had sanctioned and adopted the act of the person who placed the gravel in the road. It is on the latter account that it is cited in the text. See, however, *Knight* v. *Fox*, 5 Exc. 721, *ante*, p. 201; and see also the cases of trespass, *post*.

(*t*) *Per* Cresswell, J., in *Burgess* v. *Gray*, 1 C. B. 592.

peared in evidence in this case that the goods were lodged in a place of security, and where things of much greater value were kept. This is all that it is incumbent on the defendant to do, and if such goods are stolen by the defendant's own servants that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own" (*n*).

Clarke v. *Earnshaw.*

But where A. intrusted B. (a chronometer maker) with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited, and B.'s servant stole it, and it appeared that B. at the time when the theft was committed had deposited his own watches in a more secure place, B. was held liable to A. for its value (*x*).

Dansey v. *Richardson.*

Liability of boarding-house keeper for negligence of servants.

In the following case (*y*), the judges were equally divided in opinion as to whether or not the master was liable:—The defendant was a boarding-house keeper, and the plaintiff was received, with her luggage, as a guest for reward, paying, in fact, between 2*l.* and 3*l.* a week. She had the use of sitting, drawing and dining rooms in common with others, her own bedroom, her board and the attendance of the servants, among whom were a butler and page; and these, when required, went on errands for the guests, and carried their luggage to and from their rooms when they arrived and departed. On the 10th of December, in the evening, the plaintiff was to leave the house and to dine before she went. About half-past five, being in her bedroom, she was told dinner was ready by one of the men-servants, to whom she gave part of her luggage to take down stairs, and the other servant afterwards carried down the remainder: all were placed in the hall near the fore-door. Shortly before her departure, she sent the butler out, to a shop near, for biscuits; and it was not seriously contested by the defendant's witnesses that this servant going out left the fore-door ajar, and a thief, profiting by the opportunity, entered and carried off a box of the plaintiff's containing valuable property. There was no evidence whether the defendant had received a character for carefulness with the butler when he entered her service. There was conflicting evidence whether he had on former occasions left the door ajar, and, if so, whether that was within the knowledge of the defendant; and also, whether any former robberies, attributable to the same cause, had occurred. At the trial, Erle, J., told the jury that a boarding-house keeper was bound to take due and reasonable care about the safe keeping of the guests' goods, which he explained to be, such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods; that leaving the door ajar might be a want of such care, but that the defendant was not answerable for such negligence in the servant unless she had herself been guilty of some negligence, as in keeping such a servant with notice of his habits. The jury found for the defendant. On a rule for a new trial, it was held by the whole

(*n*) *Finucane* v. *Small*, 1 Esp. 315.

(*x*) *Clarke* v. *Earnshaw*, 1 Gow, 30.

(*y*) *Dansey* v. *Richardson*, 3 E. & B. 144.

court that a boarding-house keeper is not bound to keep a guest's luggage safely to the same extent as an innkeeper, but that she undertakes by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage, and that neglecting to take due care of the outer door might be a breach of such duty, and that, so far, the direction was right. And Erle, J., and Wightman, J., held, that unless the defendant herself was guilty of negligence, the act of the servant in leaving the door ajar was not one for which the defendant was responsible, it not being a neglect of any public duty which was owing to plaintiff, nor a breach of contract between plaintiff and defendant, but merely negligence of the servant towards his mistress, and that therefore the direction was right. Whilst Lord Campbell, C. J., and Coleridge, J., held that the act of the servant was, under the circumstances, the act of the defendant: and that there was no distinction between the personal negligence of the defendant and that of her servant in her employment, the defendant being equally answerable for both, and therefore they held the direction wrong (*z*).

Master obliged by law to employ a particular person, not liable for his acts.

But where a *master* is *obliged*, by Act of Parliament, *to employ a particular person*, and all power of selection is taken from him, it would be unjust to render him responsible for the wrongful acts of that person. Accordingly, the Pilot Act (*a*), which compels shipowners, &c., wanting a pilot, to employ the first duly licensed pilot who shall offer himself, enacts (*b*), that no owner of any ship shall be answerable for any damage which shall happen to any person by reason of the neglect or incapacity of any licensed pilot, acting in the charge of such ship, under any of the provisions of that act. The books contain numerous instances in which shipowners have been held not to be responsible for injuries caused by their vessel, whilst under the command of a licensed pilot (*c*). And it has even been held (*d*), upon the construction of the Act of Parliament, that a shipowner was not liable for injury caused by the negligent navigation of his ship whilst under the care of a pilot, although it was not compulsory upon him, under the circumstances, to employ a pilot; as it was compulsory upon the pilot to serve if called upon, and he having been called upon had taken the control of the ship.

Pilot Acts.

Lucey v. *Ingram.*

However, the decision in *Bennet* v. *Moita* has, to a certain extent, been modified by a case before the Privy Council (*e*), in which it was laid down, that the presence of a pilot on board a vessel by compulsion does not *primâ facie* exonerate the owners from the responsibility of an act of negligence in the manage-

(*z*) The court being equally divided, no new trial was granted.

(*a*) 6 Geo. 4, c. 125, s. 19; see now 16 & 17 Vict. c. 129; 17 & 18 Vict. c. 104, s. 353; c. 120.

(*b*) 6 Geo. 4, c. 125, s. 55.

(*c*) *Bennet* v. *Moita*, 7 Taunt. 258; and see cases cited in *Lucey* v. *Ingram*, 6 M. & W. 302. The case of *The Maria*, 1 W. Rob. Adm. R. 95, on the Newcastle Pilot Act, 41 Geo. 3, c. lxxxvi.

(*d*) *Lucey* v. *Ingram*, 6 M. & W. 302.

(*e*) *Hammond* v. *Rogers*, 7 Moore P. C. 160.

ment of the vessel: but that they are bound to show that the act of negligence was exclusively that of the pilot. And before that question can arise, it must be established that, under the circumstances of the case, the vessel was obliged by Act of Parliament to have a pilot on board at the time of the accident (*f*).

But where master has power of selection, he is liable, though limited to one class.

Martin v. *Temperley.*

And where a master has a power of selection, it makes no difference in his liability for the acts of the person selected, that he is bound to select from a particular *class* of persons, however numerous or limited that class may be.

Thus, although by the statute for regulating watermen and lightermen on the Thames (*g*), and the bye-laws ordained in pursuance thereof, no one besides freemen, or apprentices to freemen or to widows of freemen, of the Watermen and Lightermen's Company (with certain exceptions), may navigate craft on the river for hire, within the limits of the act, under a penalty; but any persons may keep and use craft for carrying their own goods, by their servants being such freemen or apprentices; and on board of every barge, &c., there must be at least one able and skilful man authorized by law to navigate: yet the owner of a barge, who hired two qualified persons to navigate it within the limits, was held liable for injury caused to another vessel by their negligence. And it was held to make no difference whether the navigators were hired for the job or by time (*h*). On that occasion Patteson, J., said, "On the part of the defendant it is argued that this is the case, not of master and servant, but of an independent contract to perform the work, as in *Milligan* v. *Wedge* (*i*), and *Quarman* v. *Burnett* (*k*). But that is clearly erroneous. Independently of the act, the men navigating the barges would clearly be the defendant's servants. If the defendant, being at liberty to employ whom he pleased, engaged persons to manage his barges on the Thames, I cannot see how it is possible to contend that they were not his servants, as much as a man whom he might employ to drive his carriage. Where, indeed, a man hires another man's servant from him, though such servant be employed to drive where the person hiring pleases, it has been held, in *Quarman* v. *Burnett*, that the servant so hired is not the servant of the person so hiring. That case certainly carried the exception a great way, but there the servant hired was ordinarily in the employment of the person from whom he was hired, and who let horses along with the driver. That case is not like the present. The second question then is as to the effect of stat. 7 & 8 Geo. 4, c. lxxv. That indeed confined the defendant to employing as his servants only individuals of a particular class. It narrowed the number of persons from whom he could select. But that is very different from the state of things created by the Pilot Act, where

(*f*) *Rodrigues* v. *Melhuish*, 10 Exc. 110. In an action against the pilot, he is not entitled to notice of action as for a thing done in pursuance of the Pilot Act, *Lawson* v. *Dumlin*, 9 C. B. 54.

(*g*) 7 & 8 Geo. 4, c. lxxv. See now 22 & 23 Vict. c. cxxxiii.

(*h*) *Martin* v. *Temperley*, 4 Q. B. 298.

(*i*) 12 A. & E. 737.

(*k*) 6 M. & W. 499.

a party must take the first pilot who offers himself. Here the defendant had the power of selection, though from a limited number: and no case has gone so far as to decide that the person hired ceases to be the servant of the person hiring, if he is necessarily selected from a number, though limited. I was much struck by the argument deduced from the old statute of apprenticeship. According to the doctrine contended for on the part of the defendant, it would hardly have been possible while that act was in force to employ a man as a servant. I do not put the case on the largeness of the number from which the selection may here be made: the principle seems to me the same, whether the number be five hundred or five thousand. If there be a power of selection, and not, as in the Pilot Act, a provision preventing any choice, the person hired is the servant of the person hiring."

Owner of fixed property liable for acts of persons not strictly his servants,

but only in cases of nuisance.

There is a large class of cases which must not be entirely omitted here, but which it will be sufficient to refer to generally, as they do not probably relate to the law of Master and Servant, in which the *owners of fixed real property*, as land and houses, have been held *responsible for* the acts of *persons not*, strictly speaking, *their servants*. The doctrine, however, on which these cases rest has recently been placed within its proper limits, in a very elaborate judgment pronounced by Lord Cranworth (*l*), in which he stated that, after full consideration, he had come to the conclusion that no distinction in point of law existed, in cases like that under consideration, between fixed property and ordinary moveable chattels, *unless, perhaps, in cases where the act complained of is such as to amount to a nuisance.*

Liability of master in trespass for servant's act,

if done by his command.

We have hitherto been considering chiefly the liability of a master to answer for his servant's acts in an action *on the case*. But a master may also, in many cases, be liable to an action of *trespass* for an injury caused by the *direct* act of his servant. The liability, however, of a master to be sued in this form of action, for injuries caused by his servant, does not depend upon the relationship of master and servant, though the existence of that relationship may, possibly, afford an *à fortiori* reason for holding the master responsible. His liability depends upon the fact, that the act of trespass complained of was done by *his command*, that, in truth, it was *his own* act, although done through the instrumentality of his servant, according to the maxim *Qui facit per alium, per seipsum facere videtur*. For, although a man may be a trespasser by his *own* involuntary act (*m*), no man can be made a trespasser against his will by the

(*l*) *Reedie* v. *London and North-Western Railway Company*, 4 Exc. 244: which was an action for damages sustained by a person passing under a viaduct in course of construction on the defendants' railway, and they were held not liable. In that case all the previous authorities will be found. See also *Overton* v. *Freeman*, 21 L. J., N. S., C. P. 52; *S. C.* 11 C. B. 867; *Knight* v. *Fox*, 5 Exc. 724, *ante*, p. 201.

(*m*) *Scott* v. *Shephard*, 3 Wils. 403; 2 W. Bl. 892; *Leame* v. *Bray*, 3 East, 593; *S. C.* 5 Esp. 18; and see *per* Tindal, C. J., in *M'Laughlin* v. *Prior*, 4 M. & G. 56.

act of his servant. Unless, therefore, there be evidence of the concurrence of the master's will in the act of the servant, a master can, in no case, be treated as a trespasser for the act of his servant (*n*).

If the command be express, master liable whether present or not.

If a master *expressly* order his servant to commit a trespass, there can be no doubt about the concurrence of his will in his servant's act, and no difficulty in treating him as a co-trespasser with his servant; and it can make no difference whether he himself were present or absent when the trespass was committed: if it were done by his orders, he would equally be a trespasser in either case.

So, if trespass be the necessary consequence of obeying master's command.

Again, if an act of trespass, on the part of a servant, be the *natural or necessary consequence* of an act which his master ordered to be done, his master will be liable to an action of trespass. And in this case, also, the presence or absence of the master at the time the trespass is committed can make no difference in his liability.

Gregory v. *Piper.*

Thus, where (*o*) the defendant, who disputed the plaintiff's right of way through a yard, employed a labourer to lay down rubbish in order to obstruct the way, but gave him orders not to let any of the rubbish touch the plaintiff's wall; the labourer executed those orders as nearly as he could, but some of the rubbish, it being of a loose kind, naturally shingled down towards and ran against the plaintiff's wall: the defendant was held liable in an action of *trespass.* And Littledale, J., said:—"Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order, which it is difficult for the servant to comply with, and the servant, in the execution of the order, breaks through the restriction, the master is liable in trespass. Suppose the case of two persons possessed of contiguous unenclosed land, and that the one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and that the cattle went upon the land of the neighbour, the master would be answerable in trespass, because he has only a right to expect from his servant ordinary, not extraordinary, care. If the servant, therefore, in carrying into execution the orders of his master uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant, the master will only be liable in case. Here the servant used ordinary care in the course of executing his master's order, and notwithstanding that, the rubbish ran against the wall."

So, if trespass be committed by servant in pursuance of *general*, without specific, orders,

And if an act of trespass be committed by a servant in the usual course of his employment, although there be no express command on the part of his master to do the specific act complained of, yet his master may be liable to an action of trespass, as in such case the command will be implied from the nature of the servant's employment. If, for instance, in the case of

(*n*) *Morley* v. *Gaisford*, 2 H. Bl. 442; *M'Manus* v. *Crickett*, 1 East, 106; *per* Tindal, C. J., in *M'Laughlin* v. *Prior*, 4 M. & G. 58; *Lyons* v. *Martin*, 8 A. & E. 512.

(*o*) *Gregory* v. *Piper*, 9 B. & C. 591.

Lyons v. *Martin* (*p*), the servant of the defendant had merely distrained the plaintiff's cattle damage feasant, there can be no doubt the defendant would have been held liable in trespass for the consequences of his servant's act.

or for the benefit of, and ratified by, master.

And if an act of trespass be committed by a servant on behalf and for the benefit of his master, it is perfectly clear that the master, although he gave no previous command to his servant to commit the trespass, may nevertheless render himself liable to an action of trespass by a subsequent ratification of the servant's act (*q*).

If trespass committed by servant without orders.

But where an act of trespass has been committed by a servant *without the orders* of his master, the presence or absence of the master at the time the act is done forms a very material ingredient in considering whether or not the master is liable to an action of *trespass* for the act of his servant. For, if an act of trespass be committed by a servant in his master's *absence* without his orders, there is no ground whatever for treating *the master* as a trespasser. He may be liable in another form of action, but he is not liable to an action of trespass, as his will did not concur in the act of his servant (*r*).

Master not liable if absent.

But may be liable if present.

But if an act of trespass has been committed by a servant in the *presence* of his master, if the master knew that his servant was about to commit a trespass and did not restrain him, there may be ground for presuming the concurrence of his will in his servant's act, and he may be liable to an action of trespass, although he did not expressly order the trespass to be committed. For as every master must be presumed to have power to control his servant, it may fairly also be presumed from his knowing that his servant was about to commit a trespass, and not interfering to restrain him, that he concurred in his servant's act. *Qui non prohibet, cum prohibere possit—jubet.*

Chandler v. *Broughton.*

Thus, a *gentleman*, who was *sitting by the side of his servant* in a gig which was driven by the servant, was held liable to an action of *trespass* for injury caused by the horse running away and dashing the gig against the church in Langham-place, as he had the immediate control over the servant; and Bayley, B., said:—"The rule is this; if master and servant are sitting together, and the servant is driving the master, the act of the servant is the act of the master, and the trespass of the servant is the trespass of the master. Here the act is immediately injurious to the plaintiff, and *the master was present* (*s*).

(*p*) 8 A. & E. 512; see this case, *ante*, p. 193.

(*q*) See *Eastern Counties Railway Company* v. *Broom*, 6 Exc. 314. In that case an officer of the company took *Broom* into custody for breach of the company's bye-laws, and took him before a magistrate; when the attorney of the company attended to prefer a charge *against* Broom. This was held *not* to amount to a ratification of the act of the officer. And see *Roe* v. *Birkenhead, &c. Railway Company*, 21 L. J., Exc. 9; *S. C.* 7 Exc. 86.

(*r*) *M'Manus* v. *Crickett*, 1 East, 106; see *Timothy* v. *Simpson*, 6 C. & P. 499; and *Wright* v. *Wilcox*, 19 Wendell's (American) Rep. 343, *ante*, p. 194.

(*s*) *Chandler* v. *Broughton*, 1 C. & M. 29.

If damage not too remote.

If the act of the defendant or his servant be such as to amount to a trespass on his part, it is no objection to suing him in that form of action, that the damage sustained by the plaintiff was not caused immediately by the defendant's act, so as the damage be not too remote.

Gilbertson v. *Richardson.*

Thus, where (*t*) it appeared that the plaintiff was driving with a friend along Oxford-street, in a chaise drawn by a high-spirited horse, and one of the traces getting accidentally over the shaft, he alighted for the purpose of adjusting it. While so doing, the defendant drove his carriage against the wheel of the plaintiff's chaise, and the plaintiff's friend was thrown by the shock off the seat on to the dashing-board, which, falling on the horse, caused it to kick, whereby the chaise was damaged: it was held that the defendant might be sued in *trespass* for the damages sustained.

Master not liable in trespass for servant's act done without master's orders.

But if the circumstances of the case do not show any exercise of volition, either express or implied, on the part of the *master*, he is *not liable* to be sued *in trespass* for the wilful act of his servant.

Morley v. *Gaisford.*

Thus, in *Morley* v. *Gaisford* (*u*), which was an action on the *case* for injury sustained in consequence of the negligent driving of the defendant's servant, it was held that case and *not trespass* was the proper remedy, the court saying, that "it was difficult to put a case where the master would be considered as a trespasser for an act of his servant which was not done *at his command.*"

M'Manus v. *Crickett.*

The point, however, was more formally decided in *M'Manus* v. *Crickett* (*x*), which was an action of trespass for forcibly driving the defendant's chariot against the plaintiff's chaise. It appeared that the defendant's servant *wilfully* drove the chariot against the plaintiff's chaise, but that the defendant was not himself present (*y*), nor did he in any manner direct or assent to the act of the servant: and it was held that for this wilful and designed act of the servant an action of *trespass* would *not* lie against his master. Lord Kenyon, C. J., after showing from various old cases that a master was not liable in *trespass* for the wilful act of his servant, done without his command, said, "This doctrine does not at all militate with the case in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shows, that where a servant is in point of law a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage consequential from his

(*t*) *Gilbertson* v. *Richardson*, 5 C. B. 502.

(*u*) 2 H. Bl. 442.

(*x*) 1 East, 106; and see *Wright* v. *Wilcox*, *ante*, p. 194.

(*y*) No one was in the carriage: the act was done by the servant either in going for, or after he had set down, his master.

employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant."

Gordon v. *Rolt*.

So, again, in *Gordon* v. *Rolt* (*z*), which was an action of trespass for breaking the plaintiff's crane. The plaintiff had set up the crane in a dockyard, with a view to its being tested, and, if approved of, ultimately purchased by Government. The crane itself was not fixed to the soil, but was placed in a socket which was so fixed. The defendant was the contractor for certain works then in progress in the dockyard, and employed H. as a sub-contractor. The workmen of H. broke the crane by using it to snap off the head of a pile which had been half-sawn through. Cutting off the piles was part of the defendant's work under the contract, but he had never given any authority to H. or his men to use the crane, nor did he know that they had used it. H. knew that his men occasionally used the crane, but he never authorized them to use it for any particular purpose. And it was held, that the defendant was not liable to an action of trespass for the act of H.'s workmen in breaking the crane. In the course of the argument, Lord Wensleydale said, "The result of the authorities is, that if a servant in the course of his master's employ drives over any person, and does a *wilful* injury, the servant, and not the master, is liable in trespass: if the servant by his negligent driving causes an injury, the master is liable in case: if the master himself is driving, he is either liable in case for his negligence, or in trespass, because the act was wilful."

Sharrod v. *The London and North-Western Railway Company*.

And again, in *Sharrod* v. *The London and North-Western Railway Company* (*a*), which was also an action of trespass for driving a railway engine over and killing the plaintiff's sheep. The sheep had got on the railway in consequence of a defect of fences, and were run over by an express train drawn by a locomotive engine driven by a servant of the company, who had directions to drive at a certain rate per hour. But it was held that the company were not liable to an action of *trespass*, although the injury was caused by the *direct* act of their servant, as they did not order him to drive over the sheep, nor was his doing so the necessary or probable consequence of executing the orders of the company. And Lord Wensleydale said:—"The immediate act which caused the damage to the plaintiff's cattle was the impact of a machine which was under the control of a rational agent, the servant of the defendants; not so much so, indeed, as a horse or carriage drawn by horses or propelled by mechanical power along an ordinary highway would be, in which cases both the direction and the speed of the machine are under government, but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and it being now settled that an action of trespass will

(*z*) 4 Exc. 365; *S. C.* 7 D. & L. 87.

(*a*) 4 Exc. 580; *S. C.* 7 D. & L. 213.

lie against a corporation (*b*), we may consider for the present purpose the defendants as one natural person, and the carriage under the care of his servants. Now the law is well established on the one hand, that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent not wilful, case is the only remedy against the master. The maxim, '*Qui facit per alium, facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect for employing a careless servant; but not trespass, unless as was said by the Court in *Morley* v. *Gaisford* (*c*), the act was done '*by his command*;' that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it; or some act which leads by a physical necessity to the act complained of. The former is the case, when one, as servant, is ordered to enter a close to try a right, or otherwise; the latter, where such a case occurs as *Gregory* v. *Piper* (*d*), where the rubbish ordered to be removed from a natural necessity fell on the plaintiff's soil; but when the act is that of the servant in performing his duty to his master, the rule of law we consider to be that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper; and this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant a rational agent. The agent's direct act is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master; it is the voluntary act of the servant; nor can it we think be reasonably said that all the acts done in the skilful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them; but those that were careless and unskilful were not, for he has given no order, except to use skill and care.

"Our opinion is, that in all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in *an action on the case* for want of skill or care of the agent—no more; consequently this action cannot be supported.

"We should observe, that though the master in this case is taken to have ordered the driver of the engine to proceed at a great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened if the driver had seen the cattle sooner, or the cattle had heard the engine and got out of the way. The act, there-

(*b*) See *Maund* v. *The Monmouthshire Canal Company*, 4 M. & G. 452.

(*c*) 2 H. Bl. 442.

(*d*) 9 B. & C. 591, *ante*, p. 208.

fore, cannot be treated as a trespass on the ground that it was by necessary implication ordered to be done by the defendants—the principle on which the case of *Gregory* v. *Piper* was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master; and though the injury by such an act be *direct* so far as relates to the servant, we have recently held that a master would not be responsible in trespass" (*e*).

Roe v. *Birkenhead, &c. Railway Company.*

So it has been held (*f*) that a railway company was not liable to an action of trespass for an arrest of the plaintiff by one of the officers of the company (for nonpayment of an excess of fare claimed, but not due), as there was no proof of any authority, either express or implied, given by the defendants, or of any ratification by them of the act done.

So, a man may be liable in trespass for the act of one not his servant.

M'Laughlin v. *Prior.*

The same principles which render a man liable to be sued in an action of trespass for the wrongful act of his servant will also render him liable to be sued in that form of action for the wrongful act of one who is not, strictly speaking, his servant.

Thus, where (*g*) the defendant, who, together with a party of friends, had hired a carriage and four horses, driven by two postilions in the service of the owner of the horses, to go to Epsom, rode on the box of the carriage, and in going through a toll-bar, at which there was a crowd, called out to the postilion on the leader "go in there," pointing to a position in front of a gig in which the plaintiff was riding, which belonged to and was driven by M., and the postilion pushed his horses forward, and, in doing so, upset the gig and the plaintiff, and M. fell out. Some one in the carriage cried out "go on, go on," but M. got up, stopped the horses and would not allow the carriage to proceed, although the defendant offered to settle then, until the defendant gave his card, saying, that he would be answerable for all that had occurred if M. would allow him to proceed. The defendant was held liable in trespass for the injury sustained by the plaintiff; although, according to the decision before adverted to in the case of *Quarman* v. *Burnett* (*h*), the postilions could not be considered as his servants: Erskine, J., saying, "The cases in which it has been decided that *case* will not lie against the hirer of a carriage and horses for the misconduct of the driver, not being his servant, do not apply here; for this is an action treating the defendant as a co-trespasser, and is not brought against him as a master for the misconduct of his servant."

Superior public officers not liable for acts of inferior officers.

An *exception*, however, to the general rule, which renders a man responsible in a civil action for the tortious acts of those employed by or under him, is to be found in the case of *public officers*, such as the postmaster-general, the lords commissioners

(*e*) *Gordon* v. *Rolt*, 4 Exc. 365; *S. C.* 7 D. & L. 87, *ante*, p. 211.

(*f*) *Roe* v. *The Birkenhead, Lancashire and Cheshire Junction Railway Company*, 21 L. J., Exc. 9; *S. C.* 7 Exc. 36. In this case a letter, written by the solicitor to the company, with a view to a compromise, was held not to be evidence of ratification by the company of the act done.

(*g*) *M'Laughlin* v. *Prior*, 4 M. & G. 48.

(*h*) *Ante*, p. 199.

of the treasury, the commissioners of customs and excise, the auditors of the exchequer, &c., who are *not liable* for any negligence or misconduct of the *inferior officers* in their several departments (*h*). The principle upon which their non-liability depends was settled in the year 1699, in an action brought against the postmaster-general, for the loss of a letter containing exchequer bills, by the negligence of his servants and deputies: and three judges, against Lord Holt, held, that the plaintiff was *not* entitled to recover (*i*). The ground of the opinion of the three judges appears to have been, that the post-office establishment is a branch of the public police created by statute for purposes of revenue as well as for public convenience, and that the Government have the management and control of the whole concern. It is, in short, a Government instrument, established for its own great purposes. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from Government. The same question was again still more elaborately discussed in a case in the time of Lord Mansfield (*k*), brought against the postmaster-general, to recover the amount of a bank-note stolen out of a letter by one of the sorters of letters, when the court adhered to the doctrine of the three judges, in *Lane* v. *Cotton*, against the opinion of Lord *Holt* (*l*). And Lord *Mansfield* said, "The ground of Lord Chief Justice Holt's opinion in that case is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier or the master of a ship seems to me to hold in no particular whatever. The postmaster has *no hire*, enters into *no contract*, carries on *no merchandize or commerce*. But the post-office is a *branch of revenue* and a *branch of police*, created by Act of Parliament. As a branch of revenue there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy, therefore, between the case of the postmaster and a common carrier" (*m*).

Lane v. *Cotton.*

Whitfield v. *Lord Le Despencer.*

Nicholson v. *Mouncey.*

Upon similar principles, the captain of a man-of-war has been held not responsible for damage done to another vessel by his ship, during the watch of the first lieutenant, who was on deck

(*h*) Cowp. 766; See Story on Agency, 319. The subordinates themselves, however, may be responsible, *Rowning* v. *Goodchild*, 3 Wils. 443; *S. C.* 2 W. Bl. 906; *Stock* v. *Harris*, 5 Burr. 2709, *post.*

(*i*) *Lane* v. *Cotton*, 2 Lord Raym. 646; *S. C.* 12 Mod. 482; see *Winterbottom* v. *Wright*, 10 M. & W. 109.

(*k*) *Whitfield* v. *Lord Le Despencer*, Cowp. 754.

(*l*) Page 764.

(*m*) See Story on Bailm. s. 462; Story on Agency, s. 319, note 2.

and had the direction of the ship—the captain not being on deck, nor called upon by his duty to be so, as he did not appoint the officers or crew, and had no choice whether he would serve with them or not, and had no power of dismissal over them. They were, in fact, all servants of the same master (*n*).

Aliter, for acts of *their own* servants.

But this exception would not apply so as to exempt a person, who was a public officer, from responsibility for the act of one who *was* his own servant. And, therefore, in Lord North's case (*o*), where it appeared that King Edw. 6 sold a quantity of lead, and appointed Lord North, who was Chancellor of his Court of Augmentations, to take bond for payment of the money, and Lord North ordered his clerk to take the bond, which was done, and the bond delivered to Lord North, who gave it back again to his clerk in order to send it to the clerk of the Court of Augmentations, but Lord North's clerk suppressed the bond: it was the opinion of all the judges of England, that Lord North was chargeable to the king.

Lord North's case.

Public commissioners, turnpike trustees, &c., not liable in certain cases.

Another exception to the general rule above stated is to be found in that class of cases in which commissioners appointed under Acts of Parliament, for local purposes, and acting gratuitously, such as commissioners of sewers (*p*), paving commissioners (*q*), navigation commissioners (*r*), &c., and trustees of turnpike roads (*s*), have been held not responsible for damage done by persons acting under their orders, in carrying into effect the purposes for which they were appointed (*t*). In such cases the commissioners, &c., are held not responsible for the consequences of acts which they are authorized to do (*u*), if

(*n*) *Nicholson* v. *Mouncey*, 15 East, 384.

(*o*) Dyer, 161; see *Boson* v. *Sandford*, 3 Mod. 323; and see *Wildes* v. *Norris*, 22 L. J., M. C. 4, as to how far deputy clerk of the peace is liable for the negligence of his assistant, pursuant to 59 Geo. 3, c. 28.

(*p*) *Jones* v. *Bird*, 5 B. & Ald. 844; and see *Clayards* v. *Dethick*, 12 Q. B. 439.

(*q*) *Leader* v. *Moxton*, 2 W. Bl. 924; *S. C.* 3 Wils. 461; *Governor, &c. of Cast Plate Manufacturers* v. *Meredith*, 4 T. R. 794; *Hall* v. *Smith*, 2 Bing. 156.

(*r*) *Allen* v. *Hayward*, 7 Q. B. 968, note.

(*s*) *Sutton* v. *Clarke*, 6 Taunt. 29; *Harris* v. *Baker*, 4 M. & S. 26; *Duncan* v. *Findlater*, 6 Cl. & Fin. 903. In *R.* v. *Pocock*, 17 Q. B. 34, it was held that trustees for repairing a road were not chargeable with manslaughter of a person who was accidentally killed in consequence of the road being out of repair, as their neglect of duty was not *immediately* connected with the death.

(*t*) As to the proper mode of recovering from such commissioners salary due to officers appointed by them, such as *street-keeper* by paving commissioners, see *Bogg* v. *Pearse*, 10 C. B. 534; *S. C.* 2 L. M. & P. 21; *clerk*, *Kendall* v. *King*, 25 L. J., C. P. 132; *Richardson* v. *Corcoran*, 7 Ir. C. L. Rep. 121; *Hall* v. *Taylor*, 27 L. J., Q. B. 311; *S. C.* 1 E. B. & E. 197; *organist*, *Edwards* v. *Lowndes*, 1 E. & B. 81. As to whether mandamus lies, see 1 Bail C. C. 141. *Debt* will not lie for salary due out of borough fund, *Addison* v. *Mayor of Preston*, 12 C. B. 108.

(*u*) Protection is sometimes given by Acts of Parliament to persons acting in pursuance of them. A person is entitled to that protection who acts *bonâ fide* and in the reasonable belief that he is pursuing the Act of Parlia-

done, so far as they are concerned, with due care and attention; nor are they responsible for the negligent execution of orders properly given. If they *exceed* their powers, they are of course liable (*x*); and so they are if they act wantonly and oppressively (*y*), or *maliciously* (*z*), or even carelessly and negligently (*a*), in the exercise of their powers.

The cases in which these principles have been applied are numerous (*b*), but those principles cannot be better explained than is done by Lord Wynford, in his admirable judgment in the case of *Hall* v. *Smith* (*c*).

Hall v. *Smith.*

That was an action on the case for negligently leaving a ditch or tunnel open, into which the plaintiff fell and was in-

ment, although he is really not doing so: for, as observed by Pollock, C. B., in *Hughes* v. *Buckland*, one who acts in perfect execution of the Act of Parliament does not stand in need of protection. The protection is required by him who acts illegally, but under the belief that he is right. See *Parton* v. *Williams*, 3 B. & Ald. 330; *Hughes* v. *Buckland*, 15 M. & W. 346; *S. C.* 3 D. & L. 702; *Huggins* v. *Waydey*, 15 M. & W. 357; *Davis* v. *Curling*, 8 Q. B. 286; *Smith* v. *Hopper*, 9 Q. B. 1005; *Kine* v. *Evershed*, 10 Q. B. 143; *Horn* v. *Thornborough*, 3 Exc. 846; *S. C.* 6 D. & L. 651; *Gosden* v. *Elphick*, 4 Exc. 445; *S. C.* 7 D. & L. 194; *Munday* v. *Stubbs*, 1 L. M. & P. 675; see also *Kent* v. *Great Western Railway Company*, 4 D. & L. 481; *S. C.* 3 C. B. 714, *et cas. ib. cit.*; *Booth* v. *Clive*, 2 L. M. & P. 283; *Read* v. *Coker*, 13 C. B. 850; *Arnold* v. *Hamel*, 9 Exc. 408; *Burling* v. *Harley*, 27 L. J., Exc. 258. In *Newton* v. *Ellis*, 5 E. & B. 115, it was held that a contractor, under a local board of health, was entitled to notice of action under sect. 139 of the "Public Health Act," 11 & 12 Vict. c. 63. Where powers are given, by local acts, to trustees or commissioners, *bona fides* is immaterial, although it seems to be sufficient, to entitle them to the protection of the statute, if they are trustees, &c. *de facto*. *Harrison* v. *Varty*, Q. B., Trin. T. 1845, cited by Parke, B., in *Hughes* v. *Buckland*, 15 M. & W. 356; *Braham* v. *Watkins*, 4 D. & L. 42; *S. C.* 16 M. & W. 77. But where protection is given to a person filling a particular character, he must, to entitle himself to the protection, fill that character at least *de facto*. It is not sufficient for him to *think* he fills it, *Hopkins* v. *Crowe*, 4 A. & E. 774.

(*x*) *Jones* v. *Bird*, 5 B. & Ald. 844; *Clayards* v. *Dethick*, 12 Q. B. 439.

(*y*) See *per* Gibbs, C. J., in *Sutton* v. *Clarke*, 6 Taunt. 43; *per* Bayley, J., in *Boulton* v. *Crowther*, 2 B. & C. 709.

(*z*) See *Acland* v. *Buller*, 1 Exc. 837; *Walker* v. *Goe*, 3 H. & N. 395, 404.

(*a*) *Jones* v. *Bird*, 5 B. & Ald. 844; see 2 B. & C. 711. The plaintiff must at least show negligence, *Whitehouse* v. *Birmingham Canal Company*, 26 L. J., Exc. 25.

(*b*) See, in addition to the cases cited in *Hall* v. *Smith*, in the text, *Boulton* v. *Crowther*, 2 B. & C. 703; *Duncan* v. *Findlater*, 6 Cl. & Fin. 903; *Allen* v. *Hayward*, 7 Q. B. 968, note; *Pilgrim* v. *Southampton, &c. Railway Company*, 7 C. B. 205, 228.

(*c*) 2 Bing. 156; see *Parnaby* v. *The Lancaster Canal Company*, 11 A. & E. 223. In *Scott* v. *Mayor of Manchester*, 1 H. & N. 60, Alderson, B., said, "*Hall* v. *Smith* goes too far; the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts; but if they employ their own servants to do the work, they will be liable for the acts of such servants."

jured. The defendants were the clerks to the commissioners for paving, &c. Birmingham, (who, by Act of Parliament, might be sued in the name of their clerks,) the surveyor, the contractor, and a workman, who was in the ditch when the accident happened. The jury found a verdict for the workman, and against all the other defendants, but the verdict against the clerks to the commissioners was afterwards set aside, and a verdict ordered to be entered for them. And Lord Wynford said, "This action is not maintainable against these defendants (the clerks), unless it could have been supported against the commissioners. It was not disputed that the commissioners were authorized by the act to order the tunnel to be made, which occasioned the injury to the plaintiff. No negligence was imputed to the commissioners themselves. They had ordered the tunnel to be made, and left the making of it to the defendants N. and K., the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the plaintiff from these persons not putting up rails, and not leaving lights during the night to prevent persons passing along the road in which the tunnel was made, from falling into it. These commissioners are charged with the execution of a public duty, for the performance of which *they receive no emolument or advantage*. They must employ such persons as N. and K. to do the works which the Act of Parliament orders to be done, and the commissioners cannot be expected continually to watch such persons whilst so employed. We think, under these circumstances, that the commissioners are not responsible for the accident that has happened, and that the action cannot be maintained against their clerks, but the party injured must have his remedy against the agents of the commissioners, by whose negligence it was occasioned. . . . . If commissioners under an Act of Parliament order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, but they are not answerable for the misconduct of such as they are obliged to employ. If the doctrine of *respondeat superior* were applied to such commissioners, who would be hardy enough to undertake any of those various offices by which much valuable, yet unpaid, service is rendered to the country? Our public roads are formed and kept in repair, our towns paved and lighted, our lands drained and protected from inundation, our internal navigation has been improved,—ports have been made and are kept in order,—and many other public works are conducted by commissioners who act spontaneously. Such commissioners will act no longer if they are to make amends from their own fortunes for the conduct of such as must be employed under them. It would be much better that an individual injured by the act of an agent should endure an injury unredressed, than that the zeal of the most useful members of the community should be checked by subjecting them to a responsibility for agents, from whose services they derive no benefit, and who are seldom under the immediate control of their employers, whilst they are employed on the works they

Hall v. *Smith.*

are ordered to do. The commissioners, taking the advice of their surveyors and engineers, are to direct what tunnels or other works are to be made. Few commissioners know how such works should be executed: they ought not therefore to be answerable for an imperfect execution of them, nor can it be expected that they shall attend day by day to see that proper precautions are taken against accidents, or get up in the night to see that lights are burned to warn passengers of the danger from temporary obstructions in the roads. If by taking their office of commissioners, they have not undertaken the performance of these duties, with what justice can they be charged with the consequences of the neglect of them? The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to public officers by the Statute of Westminster 2, c. 11, from the words of which statute it is taken, '*Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*'

"The terms of the Statute of Westminster the second embrace only those who delegate the keeping of gaols to deputies, and were intended only, as Lord Coke tells us (*d*), to apply 'to those who having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriffs and bailiffs, but has not been applied to any other public officer. Although the office of sheriff be now a burthensome one, yet they are entitled to poundage and other fees, for acts done by their officers, which, in old time, might be a just equivalent for their responsibility. In *Bowcher* v. *Noidstrom* (*e*), *Lawrence*, J., mentions the case of a captain of the *Russell* man-of-war, who was held answerable for the act of one of the lieutenants, who had command of the watch, in running down an *Indiaman*, whilst the captain was asleep in his cabin. When or by whom that case was decided I do not know; but it is supported by no other decision that I am aware of, and its authority is shaken by the judgment of the case in which it is cited. The actions in the cases of *Leader* v. *Moxon* (*f*), *Jones* v. *Bird* (*g*), and *The Plate Glass Company* v. *Meredith* (*h*), were not brought against the commissioners, but against those who did the acts complained of. In the latter case (*i*) I adverted to that circumstance, as distinguishing it from *Sutton* v. *Clarke* (*h*). If the counsel who advised the bringing these actions had thought they could have been maintained against the commissioners who gave the orders for the works that occasioned the injuries of the plaintiffs, the

(*d*) 2 Inst. 382.

(*e*) 1 Taunt. 568. See *Nicholson* v. *Mouncey*, 15 East, 384, *ante*, p. 214, where the captain of a man-of-war was held *not* liable under similar circumstances.

(*f*) 2 W. Bl. 924.

(*g*) 5 B. & Ald. 844.

(*h*) 4 T. R. 794.

(*i*) His lordship means *Jones* v. *Bird*.

(*k*) 1 Marsh. 429; *S. C.* 6 Taunt. 29.

commissioners would have been included. *Schinotti* v. *Bumsteed* (*l*) is distinguishable from this case; there the negligence was brought home to the commissioners of the lottery, who were the defendants, and they were compensated for their services, and were bound to pay due attention to their duty. The commissioners here had authority to make the trench which occasioned the damage to the plaintiff. *The Plate Glass Company* v. *Meredith*, already referred to, shows that no action could be maintained against them for what they are authorized to do; although an individual sustain an injury from what has been done. The passage into the plaintiff's premises in that case was rendered impassable with carts by the raising of pavement by the order of the commissioners. Lord *Kenyon* says, 'If this action could be maintained, every turnpike act, paving act, and navigation act, would give rise to an infinity of actions. The parties are without remedy, provided the commissioners do not exceed their jurisdiction.' In *Sutton* v. *Clarke*, the defendant, as a trustee under a turnpike act, who was duly authorized to make a drain, had ordered such drain to be cut in an improper manner; he had, however, given this order after having taken the best advice that could be obtained. Lord C. J. *Gibbs* considered that circumstance as distinguishing the case from that of *The British Plate Glass Company*, where what was done could not be done in any other manner than that in which it was done; but still his lordship and the rest of the court held, that as the defendant acted according to the best of his judgment, and with the best advice, he was not answerable for the injury; and he added, 'This case is perfectly unlike that of an individual who makes an improvement in his own land, from which an injury accrues to another; such person must answer for the injury, because he was *acting for his own benefit*. In *Harris* v. *Baker* (*m*), the clerk to commissioners for making a road under an act which contained a clause directing actions to be brought against such clerk for acts done by the trustees, was holden not to be liable to an action for an injury sustained in consequence of heaps of dirt being left by the side of the road, and no lights being placed to enable persons to avoid such heaps. In this case there was, as in that now before us, great negligence in those employed by the trustees.'

"From these cases I collect that the law recognizes the principles which I ventured to state were founded in sound policy and justice, and that no action can be maintained against a man acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given."

So where (*n*) by an act of Parliament for preserving Maryport *Metcalfe* v. *Hetherington.*

(*l*) 6 T. R. 646.

(*m*) 4 M. & S. 27.

(*n*) *Metcalfe* v. *Hetherington*, 11 Exc. 257. See also *Gibbs* v. *Liverpool Dock Trustees*, 26 L. J., Exc. 109; *S. C.* 1 H. & N. 439, though that case was reversed in the Exchequer Chamber, 27 L.

harbour, certain trustees, who acted gratuitously, were appointed for carrying out the act. The property in the harbour was vested in them, and they were empowered to elect and discharge a harbour-master, and other officers and servants connected with the harbour. The harbour-master was to direct the situation in which a vessel entering the harbour was to be moored. The trustees were also empowered to make bye-laws for the management of the harbour, and impose tonnage-rates upon vessels using it, and to borrow money upon such rates, and apply the proceeds in payment of the interest of the money borrowed, and of the costs and expenses attending the carrying into execution the purposes of the act connected with the harbour, and in reduction of the capital borrowed. But it did not appear that they had any funds applicable to cleansing the harbour. It was held that the trustees were not liable either for the acts of the harbour-master in directing a vessel to be moored in an improper place, whereby it received damage; or for an injury occasioned to a vessel by an accumulation of rubbish in the harbour. And it was also held that, although the trustees had almost an absolute discretion (with some exceptions) in the appropriation of the fund for the management of the harbour, they would not have been liable for the accident arising from the accumulation of rubbish in the harbour if they had been in possession of funds.

Gibbs v. *Liverpool Dock Trustees.*

However, in a subsequent and somewhat similar case (*o*), an action was brought against the trustees of the Liverpool docks, who were entitled to receive tolls and apply them (amongst other things) to cleansing the harbour; and the declaration alleged that they *had* funds sufficient to discharge *all* their liabilities, but that they did not cleanse the docks properly, and knowingly permitted them to be used in an unfit state, in consequence of which the plaintiff's vessel stuck in the mud at the entrance of the dock and was injured. The defendants were held liable *for their own default* (*p*) in not either cleansing the docks or closing them to the public when they knew their dangerous condition. And Coleridge, J., in delivering the judgment of the Exchequer Chamber, after distinguishing the case of *Metcalfe* v. *Hetherington*, said: "The case of *Parnaby* v. *The Lancaster Canal Company* (*q*) establishes that the defendants would have been responsible under such circumstances

J., Exc. 321; *S. C.* 3 H. & N. 164. See also *Frankleton* v. *Sherlock*, 8 Ir. C. L. Rep. 90, where it was held that commissioners, acting under the "Irish Town Improvement Act, 1854," 17 & 18 Vict. c. 103, were not liable for the act of a watchman appointed by them, who arrested the plaintiff on her way to church, and charged her with being an improper character; on the ground that he was not appointed to discharge any duty which belonged to them to discharge.

(*o*) *Gibbs* v. *Liverpool Dock Trustees*, 27 L. J., Exc. 321; *S. C.* 3 H. & N. 164, reversing the judgment of the court below; 26 L. J., Exc. 109; *S. C.* 1 H. & N. 439; see also *Walker* v. *Goe*, 27 L. J., Exc. 427; *S. C.* 28 L. J., Exc. 184; 3 H. & N. 395.

(*p*) In *Metcalfe* v. *Hetherington*, it was the default of the harbour-master.

(*q*) 11 A. & E. 223.

if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable, because the defendants in the present case received the tolls as trustees. The duty, in our opinion, is equally cast on those who have the receipt of the tolls and the possession and management of the dock vested in them to forbear from keeping it open for the public use of every one who chooses to navigate it, on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose, and for the consequences of this breach of duty, we think they are responsible in an action."

Public body acting for profit.

And where a public body, such as trustees or commissioners, or a public company, have statutable powers conferred upon them *partly* for their own profit and partly for the public interest, in such cases they would be liable for the acts of their servants, and would not be exempt on the ground that they were acting for the public benefit. As where (*r*) the corporation of a town were authorized by statute to carry on gasworks to light the town, the profits to go part in improving the town, part in reducing water-rates, the corporation was held liable to make compensation for an injury arising from the negligence of their servants in laying down gas-pipes.

Scott v. *Mayor of Manchester.*

Master not liable to one servant for torts of another.

Another exception to the general responsibility of a master for the tortious acts of his servant is established by the cases already considered in the preceding chapter (*s*), in which it has been held that a master is not responsible to his own servant for any injury happening to him through the negligence or wrongful act of a fellow-servant. In order, however, to bring a case within this exception it must, as we have seen, appear that both the servant injured and the wrongdoer were, at the time the injury was done, acting in the service of the common master, and also, that the wrongdoer was a person of ordinary skill and care. But where these circumstances concur, the party injured has no remedy against his master (*t*).

Similar principles would, as we have also seen (*u*), prevent a servant from recovering from a fellow-servant for negligence whilst engaged in a common employment.

(*r*) *Scott* v. *Mayor of Manchester*, 1 H. & N. 59; *S. C* in Cam. Scacc. 2 H. & N. 204; *S. C.* 26 L. J., Exc. 406; see also *Manley* v. *St. Helen's Canal Company*, 27 L. J., Exc. 159; *S. C.* 2 H. & N. 840; *Ruck* v. *Williams*, 27 L. J., Exc. 357; *S. C.* 3 H. & N. 308; *Southampton and Itchin Floating Bridge, &c. Company* v. *Southampton Local Board of Health*, 28 L. J., Q. B. 41.

(*s*) *Ante*, p. 134, *et seq.*

(*t*) See Story on Ag. 453 *d.*

(*u*) *Ante*, p. 152.

CHAPTER VI.

THE LIABILITY OF A SERVANT TO THIRD PERSONS FOR ACTS DONE ON BEHALF OF HIS MASTER.

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IN CASES OF CONTRACT.

Servant not generally liable upon contracts entered into in his master's name: but may be liable.

GENERALLY speaking, a servant who, having authority to do so, enters into a contract in his master's name, is not himself personally liable upon such contract (*a*) though he *may*, undoubtedly, like any other agent, contract in such a manner as to make himself personally liable (*b*).

In order to make a servant liable personally on a contract made in his master's name, there must be some wrong or omission of right on the part of the servant (*c*). Thus, if he do not possess authority from his master to contract in his name, or, which is in effect the same thing, if he exceed the authority given him, and fraudulently misrepresent his authority, there can be no doubt that he will be personally liable to the person with whom he deals in his master's name. If, however, the person dealing with him *knows* of his want of authority and yet chooses to charge the master, it would seem that the servant could not afterwards be made liable in the event of the master failing to pay (*d*). Questions of this sort frequently resolve themselves into mere questions of credit. To whom was the credit given? The answer to which must depend upon the circumstances of the case. If the credit was given to the master, the servant could not be made liable, provided he had authority to contract. But if the credit was given to the servant, even for goods supplied for his master's use, he could not discharge himself from liability on the ground that he was a mere agent. A servant would also be liable if, at the time he entered into a contract, he did not disclose his master's name, and it was not known to the party

(*a*) Paley on Ag. 368; Story on Ag. 261; *Ex parte Hartopp*, 12 Ves. 352; *Owen* v. *Gooch*, 2 Esp. 567.

(*b*) *Per* Ashurst, J., in *Macbeath* v. *Haldimand*, 1 T. R. 181; *per* Bayley, J., in *Thomson* v. *Davenport*, 9 B. & C. 88; and in *Burrell* v. *Jones*, 3 B. & Ald. 50.

(*c*) *Smout* v. *Ilberry*, 10 M. & W. 1.

(*d*) *Paterson* v. *Gandasequi*, 15 East, 62; *S. C.* 2 Smith's L. C. 198.

contracting with him, although he was known to be a mere agent (*d*).

But where a servant has once had authority to contract in his master's name, and the authority is revoked without his knowledge, he would not be liable upon contracts entered into in his master's name, in ignorance of the revocation of his authority. If, for instance, a man leaves a housekeeper in possession of his house, and goes abroad and dies, the housekeeper would not be liable to pay for goods obtained on her master's credit after his death, and before she knew of his death, provided they were of a description which she *was* authorized by her master to pledge his credit for during his life (*e*): although in such case her master's representatives would not be liable, as her authority to pledge his credit was in fact revoked by his death (*f*).

Servant not liable if his authority revoked without his knowledge.

Death of master.

When clerks or other servants enter into written contracts on behalf of their employers, they should be careful to do so in such a manner as to exclude the possibility of their being personally liable themselves upon such contract, in the event of their employer failing to perform the engagements thus entered into. For if such a contract purport on the face of it to bind the clerk, or party signing it, himself personally, it is not competent for him to discharge himself from liability by evidence that he was acting merely in a ministerial capacity, as agent for his employer (*g*). To exempt himself from personal responsibility, a clerk should either sign his employer's name, or, if he sign his own, should expressly state his ministerial character, as by using the words "per procuration," or other words of a similar import.

How servant can avoid personal liability upon contracts entered into on behalf of his master.

The necessity of the above caution is exemplified by the following cases, in which clerks have been held personally liable upon bills of exchange accepted or drawn for the benefit of their employers:—

Clerks held liable on bills drawn for their master.

Thus, where (*h*) the defendant accepted *generally* a bill of exchange directed to him by the name of "H. B., cashier of the

Thomas v. *Bishop.*

(*d*) So in the case of auctioneers, *Hanson* v. *Roberdeau*, Peake, 163; *Franklyn* v. *Lamond*, 4 C. B. 637.

(*e*) *Smout* v. *Ilberry*, 10 M. & W. 1.

(*f*) *Blades* v. *Free*, 9 B. & C. 167.

(*g*) *Higgins* v. *Senior*, 8 M. & W. 834; see 2 Smith's L. C. 225. And see *ib.* that the master himself may be liable if he were the real principal. But if the written contract describe the person who is really only an agent as principal, the real principal can neither sue nor be sued upon the contract, *Humble* v. *Hunter*, 12 Q. B. 310.

(*h*) *Thomas* v. *Bishop*, 2 Str. 955; see *Healey* v. *Story*, 3 Exc. 3. Mr. Justice Story, in his work on Agency, s. 159, note 3, and 269, note 1, seems to doubt the authority of *Thomas* v. *Bishop*, and, in the latter note, quotes an American case to show that such notes as that in *Thomas* v. *Bishop* are, in America, regarded as drawn upon the drawee in his *official* capacity. But in the case he quotes the acceptance was "as agent." And it would seem that the mode in which the bill in *Thomas* v. *Bishop* was addressed to the defendant, left it ambiguous whether the words "cashier," &c., were mere words of description or not, and the defendant, by accepting the bill *generally*, showed that *he* considered the bill to be *addressed* to him per-

York Buildings Company," he was held personally liable for the amount of the bill to an indorsee, although he proved that the letter of advice was addressed to the company, and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner that he had accepted other bills. For the bill on the face of it, imported to be drawn on the defendant, and it was accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself.

Lefevre v. *Lloyd.*

So where (*i*) a broker, who was employed to sell goods, drew a bill for the price on the purchaser, he (the broker) was held liable upon the bill, although it was contended that he merely drew as the servant of the seller, for, having put his name on the bill, all the legal consequences of the act attached to him as much as to any other person whose name was thereon.

Nicholls v. *Diamond.*

Again, where (*k*) a bill of exchange was directed to "Mr. James Diamond, purser, West Downs Mining Company," and accepted thus, "James Diamond, accepted per proc. West Downs Mining Company," Diamond was held personally liable upon it, as the legal effect of the acceptance was that he accepted in his own right as principal, and as agent for all the other members of the firm, but as the bill was only directed to him he only was liable.

Mare v. *Charles.*

So where (*l*) a bill of exchange was directed to "Mr. W. C.," and "accepted for the company, W. C., purser," W. C. was held personally liable: and Lord Campbell said, "*Thomas* v. *Bishop*, it appears, has been doubted on the other side of the Atlantic, but for a century it has been uniformly considered good law in this country, and it is clearly in point. In *Nicholls* v. *Diamond*, the decision itself, and far the greater part of the reasoning in the judgments, are precisely what we now adopt."

Although party taking the bill *know* clerk to be acting for his master.

Leadbitter v. *Farrow.*

And in such cases it makes no difference that a party taking the bill, do so with full knowledge that a person whose name is on the bill is a mere servant. Thus, the agent to a country bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, and who, thereupon, drew a bill in his own name for the amount upon the firm in London, the two firms being the same, was held personally liable as drawer of the bill, although the plaintiff *knew* that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money (*m*). And Lord Ellenborough said, "Is it not an universal rule that

sonally, and not in his official character. See the observations of Patteson, J., in *Davis* v. *Clarke*, 6 Q. B. 16. See *Jenkins* v. *Morris*, 16 M. & W. 877, which is a case the converse of *Thomas* v. *Bishop*.

(*i*) *Lefevre* v. *Lloyd*, 5 Taunt. 749; and see *Sowerby* v. *Butcher*, 2 C. & M. 371.

(*k*) *Nicholls* v. *Diamond*, 9 Exc. 156.

(*l*) *Mare* v. *Charles*, 5 E. & B. 978. See also *Penrose* v. *Martyn*, 28 L. J., Q. B. 29, where the secretary to a joint stock company (limited), was held personally liable upon a bill which he accepted as secretary, but omitting the word "limited," under 19 & 20 Vict. c. 47, s. 31.

(*m*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; and see *per* Gibbs, C. J., in *Goupy* v. *Harden*, 7 Taunt. 162.

a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion. Unless he says plainly, 'I am the mere scribe,' he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not done so, and, therefore, has made himself liable."

Reason.

The rule illustrated by these cases is an inflexible one, and is by no means confined to bills of exchange, but applies to other written contracts (*n*), and is founded upon the principle before adverted to, that parol evidence is not admissible to contradict or vary any contract which has been reduced to writing (*o*).

Cases where it is doubtful whether servant bound personally.

Where written contracts are entered into by clerks or other agents a difficulty frequently arises, from the mode in which they are worded, as to the meaning of the parties; whether they intended to contract for themselves personally or not. In such cases the general rule applies, that the construction of written documents is for the court. And it may be said, that, generally speaking, the onus of proving that a person who has signed a written document, merely acted as agent for some one else in so doing, lies upon the agent who would exempt himself from responsibility (*p*).

Held liable in *Appleton* v. *Binks*.

When the defendant covenanted "for himself, his heirs, executors, &c., on the part and behalf of" A. B., that A. B. would pay a sum of money, the defendant was held personally liable (*q*).

Burrell v. *Jones*.

So where the solicitors of the assignees of a bankrupt, upon whose lands a distress had been put by the landlord, gave a written undertaking, thus, "We, as solicitors to the assignees, undertake to pay," &c., they were held personally liable (*r*).

Tanner v. *Christian*.

Again, where "C., on the part of N," agreed to let certain premises to P. for a term of years, and C. signed the agreement but N. did not, C. was held personally liable to an action for not completing the lease (*s*).

Lennard v. *Robinson*.

So, where "R. and F., of London, merchants," signed a charter-party "by authority of and as agents for Mr. A. H. S.,

(*n*) *Jones* v. *Littledale*, 6 A. & E. 486; *Magee* v. *Atkinson*, 2 M. & W. 440. See *per* Lord Wensleydale, in *Higgins* v. *Senior*, 8 M. & W. 845.

(*o*) *Ante*, p. 32.

(*p*) Smith's Merc. Law, 152.

(*q*) *Appleton* v. *Binks*, 5 East, 148. See *Downman* v. *Williams*, 7 Q. B. 111; *Norton* v. *Herron*, 1 C. & P. 648; *S. C.* Ry. & M. 229.

(*r*) *Burrell* v. *Jones*, 3 B. & Ald. 47; and see *Iveson* v. *Conington*, 1 B. & C. 160; *Hall* v. *Ashurst*, 1 C. & M. 714; *Watson* v. *Murrel*, 1 C. & P. 307.

(*s*) *Tanner* v. *Christian*, 4 E. & B. 591.

of Memel," R. and F. were held personally liable for a breach of it (*t*).

Agent held *not* liable, in *Spittle* v. *Lavender*.

But where A., an auctioneer, entered into and signed an agreement as agent of B., and B. shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf," it was held that A. was not personally responsible (*u*).

Downman v. *Williams*.

And, so where A. (an agent) made a promise in the following terms, "I undertake (on behalf of Messrs. E. & Co.) to pay," &c., it was held to be (upon the face of it) an undertaking as agent, and not to be binding upon A. personally, as there appeared to be no want of authority on his part to make such an undertaking, and no excess of authority in making it (*x*).

Lewis v. *Nicholson*.

So, again, where solicitors to certain assignees, "on behalf of the assignees," consented to do certain things, the solicitors were held not to be personally liable (*y*).

Ex parte Buckley.

And where a banker signed a promissory note, "I promise to pay," &c., "for C. M. P. and S., R. M." it was held that this did not give a separate right of action against the party signing (*z*).

Mahony v. *Kekule*.

Again, where a contract was made in London, as follows, "Contract between Messrs. V. & T., Morlaix, France, and M. (plaintiff), London. M. engages himself hereby with Messrs. V. & T., Morlaix, from, &c., till, &c., for the proper and merchantable cutting, messing and preparing of French provisions, at Morlaix (as pork, beef and bacon), on receiving a free passage out to Morlaix from London and back again, and wages of 30*s.* sterling per week. Messrs. V. & T. finding the requisite tools. Should any differences arise on account of M.'s inability or improper conduct, this contract is to be considered null and void, and M. has no claim for further wages nor free passage back to London." And signed, "For V. & T. Charles Kekule" (defendant). The defendant was held not to be personally liable (*a*).

Lucas v. *Beale*.

And where the plaintiff and several others, being performers in the orchestra at the opera, Covent Garden, had a claim against the defendant for thirteen nights' salary, and negotiations took place in the green-room of the theatre, the plaintiff acting on behalf of himself and the other performers, and the plaintiff signed the following document, "The gentlemen of the orchestra, &c., are willing and hereby pledge themselves to continue their services and attend their duties provided

(*t*) *Lennard* v. *Robinson*, 5 E. & B. 125; see also *Cooke* v. *Wilson*, 26 L. J., C. P. 15; *S. C.* 1 C. B., N. S. 153; *Parker* v. *Winlow*, 27 L. J., Q. B. 49; *S. C.* 7 E. & B. 942.

(*u*) *Spittle* v. *Lavender*, 2 Brod. & B. 452; see *Bowen* v. *Morris*, 2 Taunt. 374.

(*x*) *Downman* v. *Williams*, 7 Q. B. 103; see the American cases cited in Story on Ag. 154.

(*y*) *Lewis* v. *Nicholson*, 18 Q. B. 503.

(*z*) *Ex parte Buckley*, 14 M. & W. 469.

(*a*) *Mahony* v. *Kekule*, 14 C. B. 390; *S. C.* 23 L. J., C. P. 54; and see *Green* v. *Kopke*, 18 C. B. 549, that in all cases it is a question of intention, to be gathered from the terms of the contract; whether the principal be a foreigner or not.

B. will guarantee the payment of the thirteen nights' due on the 5th ult. Signed on behalf of the gentlemen of the orchestra. C. Lucas." It was held to be a joint contract, and that the plaintiff could not sue alone for a breach of it (*b*).

Remedy against servant.

The remedy in England against a clerk or other agent, who professes to make a contract binding upon his master, but has no authority to do so, is either by an action for the deceit, alleging and proving the scienter, or probably on an implied contract that he had authority, but not by treating him as principal (*c*). In America, however, it would seem that he may in some cases at least be sued as a principal upon the instrument (*d*).

Servant not generally liable to third persons for money paid to him on account of his master.

A question, however, more frequently arises as to the personal responsibility of a clerk, or other servant, or agent to persons other than his master, or principal, for money which has been paid to him on account of his master. And the question is one of much importance, and some difficulty. The general rule applicable to cases of this sort, undoubtedly, is *respondeat superior*. Payment to a clerk, or servant, authorized to receive the money (*e*), is payment to the master, who receives by the hand of his clerk. Generally speaking, therefore, when money is *rightfully* obtained by, or paid to, a clerk, or other servant, authorized to receive it on account of his master, any action to recover it back should be brought against the master (*f*). And this rule is but just, for since, in general, an agent cannot dispute the title of his principal; and it is only in very special cases (*g*) that he can set up *jus tertii* against his principal; a servant who had received money on account of his master, could not dispute his master's right to it, and to hold him responsible to third persons would be to subject him to two actions for the same cause.

Sadler v. *Evans.*

Upon this principle depends the case of *Sadler* v. *Evans* (*h*). In that case it appeared that the defendant, as receiver to Lady W., received quit-rent due to her from the plaintiff, and gave a receipt for it as such. The plaintiff, contending that Lady W. was not entitled to the quit-rent, brought an action for money had and received against the receiver, but was nonsuited on the ground that the payment to the receiver was payment to Lady W., and the action ought to have been brought against her. And the court,

(*b*) *Lucas* v. *Beale*, 20 L. J., N. S., C. P. 134; *S. C.* 10 C. B. 739.

(*c*) See *Polhill* v. *Walter*, 3 B. & Ad. 114; *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *S. C.* 18 L. J., Q. B. 274; *Lewis* v. *Nicholson*, 18 Q. B. 503, 515; *Collen* v. *Wright*, 26 L. J., Q. B. 147; *S. C.* 7 E. & B. 301; *S. C.* in Cam. Scacc. 27 L. J., Q. B. 215; 8 E. & B. 647; *Simons* v. *Patchett*, 26 L. J., Q. B. 195; *S. C.* 7 E. & B. 568; *Randell* v. *Trimen*, 18 C. B. 786; *Eastwood* v. *Bain*, 3 H. & N. 758.

(*d*) Story on Ag. 264, note; see also 2 Smith's L. C. 223 *a*.

(*e*) Otherwise he is a mere stranger.

(*f*) Selw. N. P. 102, 11th ed.; Smith's Merc. Law, 153; Paley on Ag. 388.

(*g*) Such, for instance, as where the master has been guilty of fraud, see *Hardman* v. *Wilcox*, 9 Bing. 382, note; *Cheesman* v. *Exall*, 6 Exc. 341.

(*h*) 4 Burr. 1985; see *Greenway* v. *Hurd*, 4 T. R. 555; *Stevenson* v. *Mortimer*, Cowp. 806; acc. in America, *Colvin* v. *Holbrook*, 2 Comst. Rep. 126.

in discharging a rule which had been obtained to set aside the nonsuit, observed, that in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases (as under notice, or *malâ fide*).

Master liable.

The Duke of Norfolk v. *Worthy.*

The principle upon which *Sadler* v. *Evans* was decided may be not inaptly illustrated by a case the exact converse of it. The defendant's agent, R., had contracted to sell an estate belonging to the defendant to the plaintiff, and had received a deposit from him; but the conditions of sale not being complied with, the plaintiff brought an action against the defendant to recover his deposit. On the part of the defendant it was objected that no proof was given that the deposit had been paid over to him, and, in fact, it had not been paid to him. But Lord Ellenborough said it made no difference whether it was actually paid over or not; R. acted completely as the agent of the defendant, therefore, when the deposit was lodged with the agent, this was in law, *eo instanti*, a payment to the principal (*i*).

Clerk not liable.

Edden v. *Read.*

And the following cases, where the action was against the clerk, servant, or agent, were decided upon similar principles:—The defendant, a banker's clerk, signed a receipt for money paid into the bank by the plaintiff, thus, "For Spooner and Attwood, Wm. Read," he was held not liable to an action for money had and received at the suit of the plaintiff; but the action should have been brought against Spooner and Attwood; the receipt being evidence that they, and not the defendant, had received the money (*k*).

Stephens v. *Badcock.*

And so an attorney's clerk, who, in his master's absence, received some money which was paid to him at his master's office, by a debtor to a client of his master, and signed a receipt thus, "For Mr. S. John, John Badcock," was held not responsible to the client for the money, although he had not paid it over to his master, as he was accountable to his master for it, and the client must look to him for redress. And Lord Tenterden said, "It is perfectly clear that the defendant received the money as the agent or servant of John, and must have paid it over to him if he had returned. The receipt given was the receipt of John, and (if he had not been bankrupt) would have been evidence against him in an action brought by the present plaintiff (*l*).

Bamford v. *Shuttleworth.*

Upon similar principles it has been held (*m*) that attorneys, who, upon an agreement for the sale of an estate belonging to one Stott, had, as his agents, received from the plaintiff a deposit, were not liable to an action at the suit of the plaintiff for a return of the deposit, on the sale going off for want of title in Stott, as they received the money as *his* agents, and to account to him. And Coleridge, J., said that payment over of the deposit was immaterial. The moment the money was in the defendant's hands it was in Stott's hands.

(*i*) *The Duke of Norfolk* v. *Worthy*, 1 Camp. 337.

(*k*) *Edden* v. *Read*, 3 Camp. 338.

(*l*) *Stephens* v. *Badcock*, 3 B. & Ad. 354.

(*m*) *Bamford* v. *Shuttleworth*, 11 A. & E. 926; and see *Hurley* v. *Baker*, 16 M. & W. 26.

Cases against revenue officers.

Whitbread v. *Brooksbank.*

Campbell v. *Hall.*

Atlee v. *Backhouse.*

And so it has been held (*n*), that an action for money had and received would not lie against a revenue officer for an overpayment: though, in a subsequent case (*o*), where the duty paid remained in the hands of the collector not paid over, with the consent of the attorney-general, for the express purpose of trying the validity of imposing the duty, the court did not raise any objection to an action for money had and received against the collector. But in a more recent case (*p*) it was held, that the action would not lie against the receiver-general of excise, to recover duties said to have been overpaid to him, inasmuch as the money was paid to him for the purpose of being paid over pursuant to Act of Parliament, and it was not shown that it remained in his hands till he had notice to retain it. And the court said that unless the contrary were proved, they would presume the money had been applied by a public officer, as it was his duty to apply it.

Servant not liable if he has paid the money to his master.

Cary v. *Webster.*

The rule exempting a clerk or other servant from responsibility to third persons for money *rightfully* received on account of his master, applies *à fortiori* where the money has been *paid over* by such clerk to his master (*q*). In that case, even though the money was originally paid by mistake, the clerk paying it over to his master does no wrong. It was paid to him for the purpose of being paid over, and he has effected that purpose, and cannot again be called upon to account for the money, even though his master has no right to retain it. In an old case (*r*), therefore, where the defendant, who was a clerk of the South Sea Company, received from the plaintiff 600*l.* on account of the third subscription, and by mistake never entered it in the book, but paid it over to the company, Pratt, C. J., ruled that no action would lie against him at the suit of the plaintiff. And in a subsequent case (*s*), Lord Mansfield said, "In general the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another, and the person who made the mistake is not without redress, but has his remedy over against the principal." Upon this principle it was held (*t*), that an action for money had and received would not lie against a churchwarden to recover back dues which had been paid to him, but which he had paid over to the treasurer of the trustees of the chapel. And similar principles have been acted on in several subsequent cases, some of which are referred to in the note (*u*).

Horsfall v. *Handley.*

(*n*) *Whitbread* v. *Brooksbank*, Cowp. 69; and see *Greenway* v. *Hurd*, 4 T. R. 555, where it appeared that the money had been paid over before action brought.

(*o*) *Campbell* v. *Hall*, Cowp. 205.

(*p*) *Atlee* v. *Backhouse*, 3 M. & W. 633.

(*q*) Paley on Ag. 390; Smith's Merc. Law, 153.

(*r*) *Cary* v. *Webster*, Str. 480.

(*s*) *Buller* v. *Harrison*, Cowp. 565.

(*t*) *Horsfall* v. *Handley*, 8 Taunt. 136.

(*u*) See *Greenway* v. *Hurd*, 4 T. R. 553; *Coles* v. *Wright*, 4

Passing money in account not equivalent to payment.

The mere passing money in account by an agent without any fresh credit given to, or bills accepted on account of, his principal, is not, however, equivalent to payment over (*v*).

Servant obtaining money wrongfully cannot discharge himself by payment to his master.

But the doctrine that the receipt of a servant or agent is the receipt of his master or principal, does not apply to the cases of a servant who is a *wrongdoer*, so as to discharge him (*w*). If, therefore, a servant acting illegally or wrongfully, gets money into his hands, he cannot defend himself from an action at the suit of the party legally or rightfully entitled to it, on the ground that he acted merely as the agent of his master, and has paid over the money to him (*x*). No one but the person legally entitled to the money can give a discharge for it, and until it is paid to him, the servant or agent is liable to be sued by him for it; protected he is not prevented from suing by the rule "*in pari delicto potior est conditio defendentis*" (*y*).

Miller v. *Aris.*

This was decided in *Miller* v. *Aris* (*z*), which was an action brought by the plaintiff, who had been a prisoner in the Coldbath-fields Prison, against the governor of the prison, to recover a sum of money paid by the plaintiff for lodging, while he was confined as a prisoner in that prison, and which sum exceeded the amount allowed by the prison regulations. On behalf of the defendant it was contended that he was not liable, as he had accounted at the sessions to the county for all the sums received on account of the gaol, but he was nevertheless held liable,

Taunt. 198; *Tope* v. *Hockin*, 7 B. & C. 110; Vern. 136, 208; and see *Atlee* v. *Backhouse*, 3 M. & W. 633; *White* v. *Bartlett*, 9 Bing. 378; *Ireland* v. *Thompson*, 4 C. B. 171.

(*v*) *Buller* v. *Harrison*, Cowp. 565; and see *M'Carthy* v. *Colvin*, 9 A. & E. 607.

(*w*) Nor can payment by the servant be considered payment by the master, so as to expose him to the application of the maxim afterwards mentioned in the text, "*in pari delicto potior est conditio defendentis*." And therefore, where the plaintiff's clerk received money from his customers, and paid it to the defendants, upon the chances of the coming up of tickets in the State Lottery of 1772, contrary to the Lottery Act of that year, it was held by Lord Mansfield that the plaintiff might recover the money from the defendants, *Clark* v. *Shee*, Cowp. 197; and see *Corking* v. *Jarrard*, 1 Camp. 37, as quoted by Park, J., in *Abbotts* v. *Barry*, 2 Brod. & B. 371. Where the receipt of money by both master and servant is illegal, the latter is not liable to an action for money had and received at the suit of the former, *M'Gregor* v. *Lowe*, Ry. & M. 57; *Nicholson* v. *Gooch*, 25 L. J., Q. B. 137.

(*x*) This is strongly illustrated by *Sharland* v. *Mildon*; *Same* v. *Loosemore*, 5 Hare, 469, where it was held by Wigram, V. C., that the agent of an executor *de son tort*, collecting the assets, knowing them to belong to the testator's estate, and that his principal was not the legal personal representative, made himself personally liable as executor *de son tort*, notwithstanding he had duly accounted for his receipts to his principal. But see *Pond* v. *Underwood*, 2 Lord Raym. 1210; 1 Wms. Exors. 461.

(*y*) As the plaintiff was in *Goodall* v. *Lowndes*, 6 Q. B. 464; and see *Smith* v. *Bromley*, 2 Dougl. 695; *Williams* v. *Hedley*, 8 East, 378; *Higgins* v. *Pitt*, 4 Exc. 324.

(*z*) 3 Esp. 232; Selw. N. P. 103.

Lord Kenyon saying that *Sadler* v. *Evans* (*a*), and such cases, did not apply, where there is corruption in the foundation of the contract, or it is bottomed in oppression or immorality.

Snowdon v. *Davis.*

And so a sheriff's officer was held liable to refund to the plaintiff a sum of money which he had illegally extorted from him, under colour of a warrant from the sheriff; and it was held to be no defence that the defendant had paid the money over to the sheriff, as the defendant acted illegally in receiving the money, which could not, therefore, have been paid to him for the purpose of being paid over to the sheriff (*b*).

Steele v. *Williams.*

So where a parish clerk extorted illegal fees, *colore officii*, it was held that the plaintiff might recover them back from *him*, and need not sue the rector, for whom they were said to have been received (*c*).

Nor where he obtains the money by means of a trespass or other tort.

Neither does the doctrine above mentioned apply to cases in which a servant or agent gets money into his hands *by means of a trespass or other tort*, committed by the orders of or in company with his master or principal. For all persons concerned in a tort are principals, and as the party injured might bring his action against the servant for damages sustained in consequence of his wrongful act, he is allowed to waive his right to proceed in that form of action, and sue for the money received by the wrongdoer. Upon this ground, where (*d*) the defendant by direction of his father, who claimed to be executor of the plaintiff's wife deceased, went to her lodgings and took a large sum of money from a bureau, which he said belonged to his father as executor, and which he paid over to him accordingly: the defendant was held liable to an action for the money at the suit of the plaintiff, although it was contended that he merely acted as agent to his father, against whom the action should have been brought. And Tindal, C. J., said, "The defendant was a wrongdoer in taking the money, and would have been liable to the plaintiff in trespass. The plaintiff, however, waives the tort and sues the defendant for money had and received; and the defendant cannot relieve himself from liability by paying over the money to another party, as he might have done if the original taking had been lawful. This circumstance distinguishes the present case from *Stephens* v. *Badcock* (*e*); for there the defendant received the money as agent for a party who was entitled to receive it, whereas here the receipt was altogether wrongful, and it must be taken with all its consequences."

Tugman v. *Hopkins.*

(*a*) 4 Burr. 1985, *ante*, p. 227.

(*b*) *Snowdon* v. *Davis*, 1 Taunt. 359; see *Smith* v. *Sleap*, 12 M. & W. 585; *Valpy* v. *Manley*, 1 C. B. 594; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Davies* v. *Vernon*, 6 Q. B. 443; *Oates* v. *Hudson*, 6 Exc. 346; see also *Parker* v. *Bristol and Exeter Railway Company*, 6 Exc. 705, 706; *Townson* v. *Wilson*, 1 Camp. 396; *Chappell* v. *Poles*, 2 M. & W. 867.

(*c*) *Steele* v. *Williams*, 8 Exc. 625.

(*d*) *Tugman* v. *Hopkins*, 4 M. & G. 389; and see *Sharland* v. *Mildon*, 5 Hare, 469; *Edwards* v. *Hodding*, 5 Taunt. 815; *Neate* v. *Harding*, 6 Exc. 349.

(*e*) 3 B. & Ad. 354; see this case, *ante*, p. 228.

As to servant's liability to third persons intervening before payment to his master.

But a clerk or other servant or agent who has received money on account of his master, and *has not paid it* over to him before receiving notice not to do so, from or on behalf of the person who paid it, may be liable to refund the money, and cannot shelter himself from such liability under the maxim *respondeat superior*, if the circumstances of the case are such that had the money been paid over to the master *he* would have had no defence to an action to recover it: as in such case the servant, if obliged to pay the money over to the person entitled to it, would have a good defence to any action brought against him by his master, and would not be estopped from disputing his title to the money.

Cary v. *Webster*.

Thus, in *Cary* v. *Webster* (*f*), it was said by Pratt, C. J., that if the defendant had not paid the money over, the plaintiff would have had his option either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because, till the money is paid over, the servant receive it to his own use, or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

Buller v. *Harrison*.

So in an action (*g*) brought by the plaintiff, an underwriter, to recover back from the defendant, who was agent for the insured, Messrs. L. & S., resident at New York, a sum paid by the plaintiff upon a loss, supposed to be fair, but which turned out to be foul; the defendant had passed the whole sum in his account with Messrs. L. & S., and given credit to them for it against a sum in which they stood indebted to him, but had accepted no fresh bills nor given any fresh credit to his principals, and had not paid the money over to them: it was held that the mere placing the money to the credit of the principals was not equivalent to paying it over; and that the defendant was liable to refund the money to the plaintiffs. In delivering judgment, Lord Mansfield said, "In general, the principle of law is clear, that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it, because it is just that one man should not be a loser by the mistake of another, and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand, it is just that as the agent ought not to lose he should not be a gainer by the mistake. And, therefore, if after the payment so made to him, and before he has paid the money over to his principal, *the person corrects the mistake*, the agent cannot afterwards pay it over to his principal without making himself liable to the real owner for the amount. But the present case turns upon this, that the agent was precisely in the same situation at the time the mistake was discovered as before.

(*f*) Str. 480, *ante*, p. 229.

(*g*) *Buller* v. *Harrison*, Cowp. 565.

So where (*h*) it appeared that the defendant had received a bar of silver from his correspondent at Gibraltar, and sold it to the plaintiff at a price calculated with reference to the number of ounces, which, on assay, it was supposed to contain, and it turned out afterwards that it contained fewer ounces than had been supposed; the plaintiff was held entitled to recover from the defendant the money overpaid to him, as he had not *paid it over* to his principal, although he had forwarded an account to him, in which he had credited him with the full sum, but which was still unsettled. And Lord Ellenborough, C. J., said, "I take it to be clear that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the defendant, considering it as if it were an action against the principal." *Cox* v. *Prentice.*

So in the following case (*i*) a principal was held not entitled to set off against a debt due from him to his agent a sum of money received by the agent on account of his principal, but returned by him to the person who paid it before action brought, under circumstances which were held to justify the agent in returning the money. It was an action by a livery-stable keeper for the keep of a horse belonging to the defendant, to which the defendant pleaded a set-off for money received by the plaintiff for the use of the defendant. The horse had stood some time in the plaintiff's stables, when, at length, the plaintiff sold it with a warranty for 125*l.*, which sum the defendant claimed to set off against the plaintiff's demand. But it appeared that the horse, not answering the warranty, had been returned by the purchaser, to whom the plaintiff had returned his money before the action was brought; and it was held that the plaintiff was justified in returning the money, which could not, therefore, be set off against his claim for the keep of the horse. On behalf of the defendant it was contended that the plaintiff, an agent, could not set up his own fraud in giving a false warranty, by which he was obliged to return the money, against his principal, the defendant; but "the answer is," said Lord Wensleydale, "that the principal never had a right to the 125*l.*, except by the act of his agent in making a contract which was defeasible by reason of fraud. It is true that fraud does not make the contract actually void, but only voidable at the election of the party; but the moment the purchaser chose to declare it void, *the price was recoverable back from the plaintiff*, and it ceased *Murray* v. *Mann.*

(*h*) *Cox* v. *Prentice*, 3 M. & S. 344. It may be observed of both *Buller* v. *Harrison* and *Cox* v. *Prentice*, that the principal was a *foreigner*. As to which, see Story on Ag. s. 268; Paley on Ag. 248; *Thompson* v. *Davenport*, 9 B. & C. 78. See, however, Paley on Ag. 388, 389; Story on Ag. s. 300; and Smith's Merc. Law, 153.

(*i*) *Murray* v. *Mann*, 2 Exc. 538.

to be money in his hands received for the use of the defendant. I am, therefore, clearly of the opinion that the set-off was defeated by the proof of fraud. The plaintiff does not, in truth, set up his own fraud against the defendant, but says, 'I only received that money subject to a defeasance, which has taken effect.'"

When servant liable to third persons for money received from his master to be paid to them.

A servant may also, in some cases, be liable to an action at the suit of a third person for nonpayment of money which he has received from his master with orders to pay it to such third person. But in order to render him liable to such an action it is not sufficient that he should have received the money from his master with orders to pay it to a particular person, he must have done some act amounting to a specific *appropriation* of the money to the use of that person; he must have assented to hold it to his use, otherwise there is no privity between them, and the servant is only responsible to his master (*k*), and such assent must of course be before action brought.

Howell v. *Batt*.

This position is well illustrated by the case of *Howell* v. *Batt* (*l*). That was an action for money had and received. The plaintiff was a joint proprietor of a coach running from Exeter to London, and the defendant was office-keeper and servant to C., the proprietor at Exeter. The defendant used, in his capacity of office-keeper, at stated intervals to make up the share-bills of the coach, and take sums of money from a balance of C.'s, which he had in hand, and send them to the proprietors as their shares of the profits. On one occasion 23*l*. were due to the plaintiff, and the defendant made up a packet purporting to contain that sum, and sent it to the plaintiff. The packet only contained 20*l*., and the action was brought for the difference. No sum of money was expressly given to the defendant by C. for the plaintiff, but after the action was brought the defendant admitted that he had had the money of C., but said he had sent it to the plaintiff. The plaintiff was nonsuited on the ground that there was no privity between him and the defendant; and a rule to set aside the nonsuit was afterwards refused, Parke, J., observing, "If it had been proved that the defendant had, as it were, attorned to the plaintiff and agreed to hold the money for his use, and not subject to the direction of C., the case would have been different."

IN CASES OF TORT—CRIMINALITER.

Master's liability does not involve servant's exemption.

We have seen in the preceding chapter that a master is in many cases liable to answer criminally for the acts of his servants. Such liability on the part of the master does not, however, by any means, always involve the exemption of the ser-

(*k*) Paley on Ag. 394; see *Williams* v. *Everett*, 14 East, 582; *Lilly* v. *Hays*, 5 A. & E. 548; and other cases cited, 1 Wms. Saund. 210 *b*, note. And see *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 275, where the secretary at war was held not liable to an action at the suit of a retired clerk at the war-office for his retired allowance, although the secretary at war had received the money applicable to such allowance.

(*l*) 5 B. & Ad. 504; see *Barron* v. *Husband*, 4 B. & Ad. 611.

vant from a similar liability to answer *criminaliter* for his own acts, although performed by him in the discharge, or supposed discharge, of his duty to his master, or in obedience to his master's commands. In criminal matters it is a general rule that every person must answer for his own acts, and the command of no person can excuse an illegal act. A servant, therefore, is not, generally speaking, excused from liability to answer criminally for any violation of the law which he may commit, on the ground that he was only acting in obedience to his master's commands (*m*). This is so obviously the case in regard to offences which are *mala in se*, that no more need be said upon the subject. But where the illegal act charged is merely *malum prohibitum*, the fact that the servant was acting in obedience to his master's commands, would be strong evidence to rebut that *primâ facie* inference of the existence of a vicious mind, which generally arises from the mere doing an illegal act; and in such cases it may sometimes happen that in *this way* the command of the master may, in effect, exempt the servant from criminal responsibility for the consequences of illegal acts done in obedience to his master's orders.

Servant generally responsible, criminaliter, for his own acts,

mala in se.

Aliter, sometimes in cases of *mala prohibita.*

Thus, in the case of *R.* v. *James* (*n*). That was an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 6, for maliciously obstructing an airway belonging to a mine, with intent to hinder and delay the working of the mine. The defendants had acted under the orders of P., the lessee of an adjacent mine, and upon its being suggested by the counsel for the prosecution, that although the defendants were acting under P.'s orders, still that an order to do wrong afforded no justification, Lord Abinger, C. B., inquired, "If a servant did this by his master's order, and supposing *bonâ fide* that the master had a right to order it to be done, would it not be too much to say that the servant is answerable as a felon for doing the thing maliciously when the malice, if there is any, is his master's, and not his own?" Upon which, the counsel for the prosecution said, "Suppose a master ordered his servant to shoot a man, that would be no excuse for the servant if he did it." "But," said Lord Abinger, "that is an act which is *malum in se*. But if a master having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable in an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant *bonâ fide* did *these* acts, I think they do not amount to an offence within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so,

R. v. *James.*

(*m*) 1 Hawk. P. C. 3; 1 Hale, P. C. 44, 516; 4 Blackst. Com. 28. In *R.* v. *Parr*, 2 M. & Rob. 346, both master and servant were jointly indicted for receiving stolen goods.

(*n*) 8 C. & P. 131. And see *R.* v. *Bleasdale*, 2 Carr. & K. 768; *ante*, p. 176, where Erle, J., said, "If a man does by means of an innocent agent an act which amounts to a felony, the employer, and *not the innocent agent*, is the person accountable for that act."

acting *bonâ fide*, I am of opinion that that is not felony in them even if, in so doing, they obstruct the airway of a mine. What I feel is this, that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament. But if either of these men *knew* that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged." The prisoners were acquitted.

Unqualified servant sporting with qualified master.

Where a servant who was not qualified went out coursing with a master who was qualified, it was held that the servant could not be convicted for using dogs to kill and destroy game (*o*). And so an unqualified person who set traps to destroy game by order of his master, who was qualified, was held not liable to the penalties imposed by 5 Ann. c. 14 (*p*). But where an unqualified servant went out shooting with a master who was qualified, and fired a gun and shot game for him, he was held liable to the penalty imposed by 5 Ann. c. 14, for keeping and using a gun to kill game without a qualification (*q*), Bayley, J., saying, "The principle upon which the two former cases proceeded was, that the using the greyhounds was the act of the owner and master, and not of those who accompanied him. So, also, the trap being set by the master's orders and in his presence, must be taken to have been set by him. But we cannot say that of using the gun, neither his hand nor his skill was applied to it. If we were to hold that the firing of the gun was the act of the master, he might in the same manner use twenty guns at the same time. I think we must consider the gun to have been used by the person who actually fired it, and, if so, the cases cited are inapplicable, and there can be no doubt that S. was properly convicted."

Cases under Hawkers Act.

Although an agent who takes round goods of several employers, and offers them for sale, is bound to take out a licence under the Hawkers Act (*r*), yet it has been held that a servant or traveller, who is sent round by his employer to collect orders, in pursuance of which goods are afterwards sent, is not within that act (*s*).

Thames Watermen's Act.

It has also been held, that a servant is liable to the penalties imposed by the Thames Watermen's Act, upon any person not being a freeman of the Watermen's Company, who shall act as a waterman, &c., on the Thames, although he was working for and paid by the owner of the barge, at a fixed weekly salary (*t*).

Shopman selling as "fine gold" what was not.

Where a shopman to a jeweller was indicted for obtaining money by false pretences, he having sold a chain, &c., which was hung in the window, marked "fine gold," when it was not gold, Alderson, B., said the indictment would not lie with-

(*o*) *R.* v. *Taylor*, 15 East, 460; see also *Lewis* v. *Taylor*, 16 East, 49.

(*p*) *Walker* v. *Mills*, 2 Br. & B. 1.; see also *Spicer* v. *Barnard*, 28 L. J., M. C. 176; *Padwick* v. *King*, 29 L. J., M. C. 42.

(*q*) *Ex parte Sylvester*, 9 B. & C. 61.

(*r*) *R.* v. *Turner*, 4 B. & Ald. 510; *R.* v. *M'Gill*, 2 B. & C. 142.

(*s*) *R.* v. *M'Knight*, 10 B. & C 734.

(*t*) *R.* v. *Tibble*, 4 E. & B. 888.

out showing guilty knowledge on the part of the defendant, who was merely acting as shopman, and the jury having found that there was no guilty knowledge, the prisoner was acquitted. "If," said the learned Baron, "the master had been indicted, the evidence might apply, because the jury would infer that he was aware of the quality of the articles that he was selling, but it was different in the case of a shopman. Although, undoubtedly, a gross fraud, it did not constitute an indictable offence" (*u*).

Servant liable to indictment for breach of duty to his master, which involved public duty.

There are also many cases which may properly be mentioned in this place, but to which it is unnecessary to advert at any length, as they scarcely come within the scope of the present work, in which servants may be liable to indictment for culpable neglect of the duty undertaken by them towards their employer, where that duty also involved a duty to the public. Such, for instance, as the driver of a carriage or the captain of a vessel, who, by negligent driving or navigation, causes the death of any person. In such cases, though the master may be liable in a civil action for the consequences of his servant's negligence, yet the servant must answer *criminally* for his own personal negligence (*x*).

R. v. *Haines.*

In a case, therefore, in which the ground bailiff of a mine, whose duty it was to cause proper air-headings to be put up to prevent the accumulation of noxious gases, neglected to do so, and an explosion of fire-damp took place, which killed a person, for whose manslaughter he was indicted; Maule, J., in summing up, told the jury that if they were satisfied that it was the ordinary and plain duty of the prisoner to have caused an air-heading to be made, and that a man using reasonable diligence would have had it done, and that by the omission the death of the deceased occurred, they ought to find the prisoner guilty of manslaughter (*y*). But it has been held that an engineer, under similar circumstances, could not be convicted of manslaughter upon an indictment which did not allege a duty in him which he had neglected to perform (*z*). It would seem, however, to be sufficient to allege *facts* from which the law would infer such duty (*a*).

R. v. *Barrett.*

R. v. *Hughes.*

Where a banksman, whose duty it was to place a stage on the mouth of a shaft to receive a loaded truck run down to it on a tramway, neglected to place the stage, in consequence of which the truck fell down the shaft and killed a workman, the

(*u*) *R.* v. *Lamade*, Centr. Cr. Court, Feb. 4th, 1853.

(*x*) See *R.* v. *Allen*, 7 C. & P. 153; *R.* v. *Green*, *ib.* 156, where the captains of steamers were indicted for the manslaughter of persons killed by being run down by the steamers: but were acquitted, as there was no proof of any *personal* act, and see *R.* v. *Taylor*, 9 C. & P. 672.

(*y*) *R.* v. *Haines*, 2 Carr. & K. 368, the prisoner was acquitted. See also *R.* v. *Pocock*, 17 Q. B. 38. The neglect of duty must be *immediately* connected with the death.

(*z*) *R.* v. *Barrett*, 2 C. & K. 343. See the form of the indictment in the note to *R.* v. *Haines*, *ubi supra.*

(*a*) *R.* v. *Hughes*, *infra.*

banksman was held guilty of manslaughter (*b*). In that case Lord Campbell said: "It was the duty of the prisoner to place the stage on the mouth of the shaft. The death of the deceased was the direct consequence of the omission of the prisoner to perform this duty. If the prisoner, of malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this duty (*c*). But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter. It has been held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned in running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient (*d*). But there is no authority for the position that without an act of commission there can be no manslaughter; and, on the contrary, the general doctrine seems well established that what constitutes murder being by design and of malice prepense constitutes manslaughter when arising from culpable negligence."

Indictments for nuisances.

Moreover, many instances are to be found in the books of cases in which servants and workmen have been joined with their masters and employers in indictments for nuisances; some of which, by way of example, are referred to in the note (*e*).

Punishment of persons employed on railways guilty of misconduct. 3 & 4 Vict. c. 97, s. 13.

The performance of their duties to their masters by servants of railway companies are enforced by Act of Parliament. Thus in the Act for Regulating Railways (*f*), there is, for the protection of the public, inserted a provision for the punishment of servants of railway companies who are guilty of misconduct. By that act it is enacted "That it shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine-driver, guard, porter or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any

(*b*) *Ibid.* 26 L. J., M. C. 202; *S. C.* 1 Bell, C. C. 248.

(*c*) *R.* v. *Edwards*, 8 C. & P. 611; *R.* v. *Goodwin*, 1 Russ. on Cr. 563, note, 3rd edit.

(*d*) *R.* v. *Allen*, 7 C. & P. 153.

(*e*) *R.* v. *Pease*, 4 B. & Ad. 30; *R.* v. *Scott*, 5 Q. B. 543; *R.* v. *Charlesworth*, 16 Q. B. 1012; *R.* v. *Betts*, 16 Q. B. 1022. See also *Wilson* v. *Peto*, 6 B. Moore, where a clerk who directed the workmen and superintended the erection of a building which occasioned a nuisance, was held liable as a co-defendant with the contractor. *Thompson* v. *Gibson*, 7 M. & W. 456.

(*f*) 3 & 4 Vict. c. 97, s. 13.

offence against any of the bye-laws (*g*), rules or regulations of such company, or shall wilfully, maliciously or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company or the works thereof respectively shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages or trains shall be or might be obstructed or impeded, and to convey such engine-driver, guard, porter or other servant so offending, or any person counselling, aiding or assisting in such offence with all convenient despatch before some justice of the peace for the place within which such offence shall be committed without any other warrant or authority than this act; and every such person so offending and every person counselling, aiding or assisting therein as aforesaid shall, when convicted before such justice as aforesaid (who is hereby authorized and required, upon complaint to him made upon oath, without information in writing, to take cognizance thereof and to act summarily in the premises) in the discretion of such justice be imprisoned with or without hard labour for any term not exceeding two calendar months, or in the like discretion of such justice shall for every such offence forfeit to her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned with or without hard labour as aforesaid for such period not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty, and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner."

Sect. 14. Justice of the peace empowered to send any case to quarter sessions.

"Provided always (*h*) that (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the quarter sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of her Majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending and convicted before such court of quarter sessions as aforesaid (which said court is hereby required to take cognizance of and hear and determine such complaint), shall be liable, in the discretion of such court, to be imprisoned, with or without hard labour for any term not exceeding two years."

By the Act for the better Regulation of Railways (*i*), passed a few years afterwards, after reciting the foregoing provision, and that it was expedient to extend the same, it is enacted, that it shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons

5 & 6 Vict. c. 55, s. 17.

(*g*) As to the making of bye-laws, see the "Companies Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 16, s. 127, *et seq.*, and the "Railways Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 20, s. 108, *et seq.*

(*h*) Sect. 14.

(*i*) 5 & 6 Vict. c. 55, s. 17.

5 & 6 Vict. c. 55, s. 17.

as they may call to their assistance, to seize and detain any engine-driver, waggon-driver, guard, porter, servant or other person employed by the said or by any other railway company, or by any other company or person in conducting traffic upon the railway belonging to the said company, or in repairing or maintaining the works of the said railway, who shall be found drunk while so employed upon the said railway; who shall commit any offence against any of the bye-laws (*k*), rules or regulations of the said company; or who shall wilfully, maliciously or negligently do, or omit to do, any act whereby the life or limb of any person passing along or being upon such railway, or the works thereof respectively, shall be or might be injured or endangered; or whereby the passage of any engines, carriages or trains shall or might be obstructed or impeded, and to convey such engine-driver, guard, porter, servant or other person so offending, or any person counselling, aiding or assisting in such offence, with all convenient dispatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this act; and every such person so offending, and every person counselling, aiding or assisting therein as aforesaid, shall, when convicted upon the oath of one or more credible witness, or witnesses, before such justice as aforesaid (who is hereby authorized and required upon complaint to him made upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises), in the discretion of such justice be imprisoned, with or without hard labour, for any term not exceeding two calendar months; or, in the like discretion of such justice, shall, for every such offence, forfeit to her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour, as aforesaid, for such period not exceeding two calendar months, as such justice shall appoint, such commitment to be determined on payment of the amount of the penalty, and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner."

Clauses also are to be found in various other Acts of Parliament subjecting workmen and servants to penalties for offences against the act committed whilst in the supposed discharge of their duty to their employers. Thus, in the Act for Rebuilding Westminster Bridge (*l*), there is a clause which provides that in case of damage or mischief done to the bridge by any ship, lighter, &c., through the wilful negligence of any person having the command of any such ship, lighter, &c., or any of the mariners or persons employed therein, the owner of such ship, lighter, &c., shall be answerable for the amount; and then follows a clause enacting, "That in case the owner of any such ship, lighter, barge, boat, float, raft or vessel shall be compelled to pay any penalty, or to make satisfaction for any damages by reason of any neglect or default done or committed by his servants or mariners, or any of them, such servants or mariners, and each and every of them, shall be liable to

Servants or mariners wilfully injuring Westminster bridge liable to indemnify master.

(*k*) *Supra*, p. 239, note (*g*).

(*l*) 16 & 17 Vict. c. 46, ss. 15, 16.

pay such penalty or damages (with the costs thereof) to such owner; and in case of nonpayment upon demand thereof, and oath made by such owner of the payment made by him of such penalty, satisfaction, or damages, and that the same, and the costs thereof, have not been repaid to him by such servants or mariners, or any of them, although demanded, (such oath to be made before any one or more justice or justices of the peace of the county or place where such penalty or satisfaction shall have been recovered,) the amount thereof, provided the same shall not exceed the sum of twenty pounds, shall be recovered in the same manner as any penalty is thereby directed to be recovered," *i. e.*, under the provisions of the Companies Clauses Consolidation Act, 1845 (*m*).

Workmen violating Metropolitan Building Act.

And in the Metropolitan Building Act, 1855 (*n*), there is a provision that if any workman, labourer, servant, or other person employed in or about any building, wilfully, and without the privity or consent of the person causing such work to be done, does anything in or about such building contrary to the rules of that act, he shall, for each such offence, incur a penalty not exceeding 50*s*.

It is no answer in *criminal* proceedings that person injured or others contributed to his injury.

A distinction of considerable importance must also here be adverted to, which obtains between civil and criminal proceedings for the consequences of negligence. In civil proceedings, as we have seen, no person can recover damages against a master for the negligence of his servant if he has by his own negligence contributed to or caused the injury complained of. But in criminal proceedings the converse of that proposition is true: and it is no answer to a criminal charge, as of manslaughter, that the deceased by his own negligence or improper conduct, or by being deaf or drunk, contributed to his own death (*o*). So highly does the law value human life, that every person who has contributed to destroy it, is responsible; and it does not diminish that responsibility that others also have been guilty of negligence (*p*).

IN CASES OF TORT—CIVILITER.

All wrongdoers are principals. *Sands* v. *Child*.

It is a general rule in cases of tort, that all persons concerned in the wrong are liable to be charged as principals. It was said in *Sands* v. *Child* (*q*), "that the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." A servant, therefore, can in no case excuse himself from liability to an action founded upon a misfeasance or positive wrong done to another person, upon the

Servant liable for misfeasance, though in

(*m*) 8 & 9 Vict. c. 16.

(*n*) 18 & 19 Vict. c. 122, s. 48.

(*o*) *R.* v. *Swindall*, 2 C. & K. 230.

(*p*) *Ibid.*; and see *R.* v. *Haines*, 2 C. & K. 368.

(*q*) 3 Lev. 352. But see *Buron* v. *Denman*, 2 Exc. 167, where the captain of a man-of-war, having committed an act of trespass, which was afterwards adopted and ratified by the Crown, was held not liable to be sued by the party injured, who had his remedy against the Crown only (such as it was).

obedience to his master's orders; but not for mere nonfeasance.

ground that he acted merely in obedience to his master's orders or for his master's benefit (*r*). But for mere nonfeasance or omission of duty, a servant is not liable to answer in a civil action at the suit of third persons, but only to his own master (*s*), who, in accordance with the maxim already alluded to '*Respondeat superior*,' is liable to answer for his servant's neglect" (*t*). This distinction between misfeasance and nonfeasance was thus stated by Lord Holt, in his celebrated judgment in *Lane* v. *Cotton* (*u*). "It was objected at the bar that they have this remedy against Breese (the servant). I agree if they could prove that he took out the bills they might sue him for it: so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him, for they must consider him only as a servant, and then his neglect is only chargeable on his master or principal; for a servant or deputy *quatenus* such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer."

Perkins v. *Smith*.

Upon the principle that a servant is liable for a *misfeasance*, the defendant was held liable in *Perkins* v. *Smith* (*x*), which

(*r*) In *Pearson* v. *Graham*, 6 A. & E. 902, Lord Denman, C. J., said, "It might be very doubtful whether a servant delivering goods by his master's order could be said to have converted those goods as against the assignees of his master. *Coles* v. *Wright*, 4 Taunt. 198, rather seems to show that he could not." The case of *Coles* v. *Wright*, however, seems to belong to a different class of cases, *ante*, p. 229. It was an action for money had and received, and the defendant was held not liable, as he had paid the money over to his master. And in *Pearson* v. *Graham*, the defendant, who had received no express orders as to the goods in question, but took upon himself, under a general authority, to sell and deliver them at a time when, as it afterwards turned out, his master had committed an act of bankruptcy, was held liable to an action of trover, at the suit of his master's assignees. Any distinction between the effect of a special and a general authority from the master to the servant, upon the liability of the servant would seem to be opposed to the cases of *Perkins* v. *Smith* and *Stephens* v. *Elwall*, afterwards cited in the text; and which cases were not cited in *Pearson* v. *Graham*.

(*s*) *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 275, 285.

(*t*) So the servant of a carrier is not generally responsible for the loss of a parcel to the owner, who should look to the master, *Williams* v. *Cranstoun*, 2 Stark. 82; *Cavanagh* v. *Such*, 1 Price, 328, as the duty (the breach of which gives the right of action) arises out of a contract with the master. See *Marshall* v. *The York, Newcastle, and Berwick Railway Company*, 21 L. J., C. P. 34; *S. C.* 11 C. B. 655, where it was held that a servant might maintain an action *against* carriers for loss of his luggage, although his master paid the fare. See also *Collett* v. *North-Western Railway Company*, 16 Q. B. 984; *Longmeid* v. *Holloway*, 6 Exc. 767; *Dalyell* v. *Tyrer*, 28 L. J., Q. B. 52.

(*u*) 12 Mod. 488.

(*x*) 1 Wils. 328; see *Simonds* v. *Atkinson*, 1 H. & N. 146; and see *Michael* v. *Alestree*, 2 Lev. 172, *ante*, p. 184, where the action (for negligent driving) was brought against both master and servant.

may be regarded as a leading case upon this subject. In that case the facts were shortly these:—The plaintiff was assignee of a bankrupt, and the defendant servant and riding-clerk to a creditor of the bankrupt; the defendant went to the bankrupt's shop to try and get his master's money and found it shut up, but the bankrupt delivered to the defendant certain goods, for which the defendant gave a receipt in his master's name, and then sold the goods for his master's use; upon which the bankrupt's assignee brought an action of trover against the servant. It was objected that the action was improperly brought against the servant, who acted wholly in this matter for his master, and that the conversion, which is the gist of the action of trover, was found to be to the use of the master. But after two arguments at the bar, the court gave judgment for the plaintiff, Lee, C. J., saying, "The point is whether the defendant is not a tort-feasor, for, if he is so, no authority that he can derive from his master can excuse him from being liable in this action. The act of selling the goods is the conversion, and whether to the use of himself or another, it makes no difference. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master, before or after the fact, can excuse him."

Stephens v. *Elwall*.

The rule thus laid down was again acted on in *Stephens* v. *Elwall* (*y*), which was also an action of trover by the assignees of a bankrupt for goods which the bankrupt had sold after his bankruptcy to D., to be paid for by bills on H., for whom the goods were bought. H. was in America, and the defendant was his clerk; the goods were delivered to the defendant, who sent them to H. in America. At the trial it was contended, on the authority of *Perkins* v. *Smith*, that the defendant was liable, although he merely acted as clerk to H.; the judge, however, thought otherwise, and so directed the jury, who found a verdict for the defendant. But in the following term a new trial was granted, Lord Ellenborough, C. J., saying: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the court is governed by the principle of law and not by the hardship of any particular case. For what can be more hard than the common case in trespass where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall *not recover contribution*" (*z*).

(*y*) 4 M. & S. 259; see *Greenway* v. *Fisher*, 1 C. & P. 190.

(*z*) See, as to this point, *Merryweather* v. *Nixan*, 8 T. R. 186; *S. C.* 2 Smith's L. C. 297, where the subsequent cases will be found collected. See also *Farebrother* v. *Ansley*, 1 Camp. 343;

Cranch v. *White.*

Similar principles were again enforced in *Cranch* v. *White* (*a*). That was an action of trover for a bill of exchange which had been entrusted by the plaintiff to one Roberts to get discounted. Roberts owed the defendant's mother, who was a coal merchant, and whose clerk the defendant was, a large sum for coals, and instead of getting the bill discounted, Roberts endorsed it and placed it in the hands of the defendant, who carried it to the credit of Roberts's account with his, the defendant's, mother. The defendant, when apprised of Roberts's fraud, refused to deliver up the bill; but it was held that by so doing he rendered himself liable to the action of trover which was brought against him, although it was contended on his behalf that the action should have been brought against his mother; Tindal, C. J., saying that any justification of the defendant's conduct, as the agent of his mother, fell to the ground on the authority of *Perkins* v. *Smith* and *Stephens* v. *Elwall.*

Powell v. *Hoyland.*

And again, in *Powell* v. *Hoyland* (*b*). In that case the defendant, acting on behalf of Y. and Co., obtained from the plaintiff certain bills of exchange under circumstances which did not entitle Y. and Co. to them. These circumstances were unknown to the defendant at the time he obtained the bills from the plaintiff, but he was afterwards, and before he had delivered the bills to Y. and Co., informed of the facts, and told that his employers had no right to the bills. In spite of this information he refused to give the bills to the plaintiff, and delivered them to his employers; and it was held that by so doing he became liable to an action of trover; Lord Wensleydale observing, "there is no doubt that, though the defendant did not receive the bills for himself but as the agent of Y. and Co., he may be liable in an action of trover, if the facts show a conversion by him;" which they were held to do.

Servant not liable without proof of actual conversion by him.

Where, however, a servant merely refuses to deliver goods received from his master to any other person, without his master's orders, such refusal has been held not to amount to a conversion by the servant, and he has accordingly been held not liable to an action of trover (*c*).

Mires v. *Solebay.*

Upon this distinction depends the old case of *Mires* v. *Solebay* (*d*). There the defendant, by command of his master, drove some sheep, which the plaintiff claimed to have purchased, on to his master's land, and then refused to deliver them to the plaintiff: he was held not liable in trover for so doing; "for it being in obedience to his master's command, though he had no title, yet he shall be excused."

Adamson v. *Jervis*, 4 Bing. 66. As to whether the court would interfere to protect the servant, see *Gregory* v. *Slowman*, 1 E. & B. 360.

(*a*) 1 Bing. N. C. 414; and see *Davies* v. *Vernon*, 6 Q. B. 443.

(*b*) 6 Exc. 67.

(*c*) If he refuse to give up goods to the rightful owner, and *rely* on his master's title, he may be liable in trover; aliter, if he merely give a qualified refusal and refer to his master, *Lee* v. *Robinson*, 25 L. J., C. P. 249; *Lee* v. *Bayes*, 18 C. B. 599, 607.

(*d*) 2 Mod. 242.

So where (*e*) the defendant, who was servant to an insurance company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the company, and upon the plaintiff demanding the goods, said he could not deliver them without an order from the company, he was held not liable to an action of trover, as the refusal to deliver the goods without an order from his master did not amount to a conversion of the goods. "If," said Holroyd, J., "we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house and to ask his servant to deliver goods to him, and the servant were to refuse to do so unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins* v. *Smith* the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires* v. *Solebay* is an authority in point." *Alexander* v. *Southey.*

But a *warehouseman* (*f*) who refused to deliver goods out of his warehouse to the rightful owner, without the direction of the person from whom he (the warehouseman) received them, was held liable to an action of trover at the suit of the rightful owner, as such refusal was considered to be sufficient evidence of conversion. In that case, however, the defendant was a warehouseman, and it was considered that the defendant had by his conduct *identified* himself with the person from whom he received the goods; whereas, in *Alexander* v. *Southey*, the defendant was merely a servant, and referred the parties to his master (*g*). *Wilson* v. *Anderton.*

Where a servant of the law refused to give up goods which had been attached by legal process, saying that they were in the custody of the law, his doing so was held not to amount to a conversion so as to render him liable to an action at the suit of the owner of the goods (*h*). There, however, the defendant remained *passive*, had he taken upon himself to decide, he might perhaps have rendered himself liable (*i*). *Verrall* v. *Robinson.*

We have already seen that if a servant is guilty of a fraud in transacting his master's business, the master may be liable to an As to servant's liability for

(*e*) *Alexander* v. *Southey*, 5 B. & Ald. 247; and see *Grylls* v. *Davies*, 2 B. & Ad. 514. In *Day* v. *Bream*, 2 M. & Rob. 54, a porter who, in the course of his business, delivered parcels containing libellous publications, was held not liable to an action for libel, as he was ignorant of the contents of the parcel.

(*f*) *Wilson* v. *Anderton*, 1 B. & Ad. 450.

(*g*) See *Catterall* v. *Kenyon*, 3 Q. B. 310.

(*h*) *Verrall* v. *Robinson*, 2 C. M. & R. 495.

(*i*) *Catterall* v. *Kenyon*, 3 Q. B. 310.

fraud in transacting his master's business.

action at the suit of the party defrauded (*i*). And it would seem to be the better opinion that the servant also is liable, if he *knowingly* commit a fraud in his master's business, to answer for it to the party injured, and cannot shelter himself under his master's responsibility, although authorized by his master to commit the fraud; for, as observed by Mr. Justice Story (*k*), it is an illegal act and contrary to sound morals. It is indeed laid down in Rolle's Abridgement (*l*), that if the servant of a taverner sell bad wine knowingly, no action lies against him, for he only did it as servant. But that position has been frequently doubted by text-writers (*m*), and would seem to be contrary to the principle of the cases before referred to, in which the command of the master has been held no justification of a misfeasance on the part of the servant.

Public officers in subordinate capacity personally liable for misfeasance.

We have also, whilst treating of the liability of a master for the tortious acts of his servants, seen that an exception to his general liability in such cases is established in the case of public officers in a superior capacity who are not in general responsible for the tortious acts of their subordinate officers. It by no means follows, however, that such subordinate officers are not themselves responsible for their own misdeeds. On the contrary, the exemption of their superior officers from liability to answer for their misfeasances, would seem to offer an *à fortiori* reason for holding *them* responsible for their own acts, otherwise wrongs committed by them might go altogether unredressed, since, upon public grounds, Government are not generally responsible for the misfeasances of their officers (*n*).

Deputy Postmaster.

Accordingly, in the cases before referred to, of actions against the postmaster-general for the loss of letters, we find it admitted on all hands that the servant, through whose negligence the letters were lost, would have been liable to actions at the suit of the parties injured, and the only question made was, as to the liability of the master. "As to an action on the case lying against the party really offending," said Lord Mansfield (*o*), "there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post-office loses any of them, he is answerable, so is the sorter in the business of his department, so is the postmaster for any fault of his own." Upon this principle, in several cases, the deputy postmaster has been held liable to an

(*i*) *Ante*, p. 188. See also *Bedford* v. *Bagshaw*, 29 L. J. Exc., 59, *et cas. ib. cit.*

(*k*) Story on Ag. 310.

(*l*) 1 Roll. Abr. 95; see Com. Dig. Action upon the case for a Deceit, B.

(*m*) See Mr. Justice Coleridge's edit. of Blackst. Comm. vol. i. 431, note 11; Story on Ag. 310, note 1; Smith's Merc. Law, 155, note *k*; Paley on Ag. 392, note.

(*n*) It has, however, been held that the captain of a man-of-war, who had committed an act of trespass in the public service, which was subsequently ratified by the *ministers of state*, was not liable to an action at the suit of the party injured, who had his remedy, such as it was, against the Crown only, *Buron* v. *Denman*, 2 Exc. 167.

(*o*) In *Whitfield* v. *Lord Le Despenser*, Cowp. 765.

action for the nondelivery of letters which it was his duty to have delivered, as well as the penalty for detaining letters imposed by statute (*p*).

Ministerial public officers liable for negligence, &c.

There is also a large class of cases, which may be conveniently noticed in this place, in which public officers in a merely *ministerial* capacity (*q*), have been held liable to answer in an action at the suit of the party injured, for negligence in the performance of the duties cast upon them. Thus, for instance, a sheriff, whose duty in many cases, such as the receipt, execution and return of writs, is that of a merely ministerial officer, is liable to be sued by the party aggrieved for any act of irregularity, misfeasance or nonfeasance in executing writs (*r*).

Sheriff; but not under-sheriff.

But an action by the party grieved does not generally lie (*s*) against an *under-sheriff* for a breach of duty in the office of sheriff; the action must be brought against the high-sheriff as for an act done by him (*t*), and if it proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high-sheriff (*u*).

Returning officer.

A returning officer at an election of members of Parliament, was held by the House of Lords, in the great case of *Ashby* v. *White*, to be liable to an action for maliciously refusing to receive the vote of a person entitled to vote (*x*).

Overseer.

And the case of *Perring* v. *Harris* (*y*), which was an action against an overseer of the poor, for maliciously omitting to insert the plaintiff's name in the poor-rate, whereby she was prevented from obtaining a licence to sell beer, was one of a similar nature.

Lottery Commissioners.

So lottery commissioners have been held liable to an action for not adjudging a prize to the holder of a ticket entitled to receive it (*z*).

Collector of customs.

And so a collector of customs, appointed by the commissioners

(*p*) *Stock* v. *Harris*, 5 Burr. 2709; *Barnes* v. *Foley*, *ib.* 2711; *Rowning* v. *Goodchild*, *ib.* 2715; *S. C.* 3 Wils. 443; 2 W. Bl. 906; see *Couch* v. *Steel*, 23 L. J., Q. B. 126.

(*q*) But no action lies against persons acting in a *judicial* capacity, *Groenvelt* v. *Burwell*, 1 Lord Raym. 454; see *Miller* v. *Seare*, 2 W. Bl. 1145; *Doswell* v. *Impey*, 1 B. & C. 163.

(*r*) Bac. Abr. Sheriff, M.; Watson's Sheriff, 117.

(*s*) In certain cases it does by Act of Parliament, see Cowp. 405. And in Ireland all actions may, by 57 Geo. 3, c. 68, s. 3, be brought against the under-sheriff, unless for the immediate act of the sheriff.

(*t*) For the under-sheriff ought to act in the name of the high-sheriff, see Wats. Sheriff, 37; and *Stroud* v. *Watts*, 2 C. B. 929; *S. C.* 3 D. & L. 799; *R.* v. *Schlesinger*, 10 Q. B. 670.

(*u*) *Cameron* v. *Reynolds*, Cowp. 403.

(*x*) 2 Lord Raym. 938; *S. C.* 1 Salk. 19; 6 Mod. 45; 1 Smith's L. C. 105; and see *Cullen* v. *Morris*, 2 Stark. 577; *Pryce* v. *Belcher*, 3 C. B. 58; *S. C.* 4 D. & L. 238, which were similar actions, and from which it would seem that *malice* is a necessary ingredient in such action, as the returning officer is partly a judicial and partly a ministerial officer, though it was formerly thought otherwise, see *per* Holroyd, J., in *Doswell* v. *Impey*, 1 B. & C. 165.

(*y*) 2 M. & Rob. 5.

(*z*) *Schinotti* v. *Bumsted*, 6 T. R. 646.

under the statute 3 & 4 Will. 4, c. 51, was held liable (*a*) to an action at the suit of the party grieved, for nonfeasance in the exercise of his office, viz., for refusing to sign a bill of entry of certain goods without payment of an excessive duty. In giving judgment in that case Lord Denman, C. J., said:—"The defendant is a public ministerial officer, and being so is responsible for neglect of his duty to any individual who sustains damage by such neglect. *Schinotti* v. *Bumsted* (*b*) is a strong authority to this effect; the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them; and in *Lacon* v. *Hooper* (*c*), which was an action against the commissioners of customs for not making a certain order for the payment of money to which the plaintiffs claimed to be entitled under an act for the encouragement of the South Sea whale fishery, it was not questioned but that even they would be liable to the action if the neglect of duty were made out."

Commissioners of customs.

Ward v. *Lee.*

Where an act of Parliament provided that no matter or thing done, or contract entered into by the Commissioners of Sewers or by any clerk, surveyor or other officer or person acting under their direction, should, if the matter or thing were done or the contract were entered into *bonâ fide* for the purpose of executing the act, subject them personally to any action or liability whatever, and any expense incurred by them was to be borne and paid out of the funds under the control of the commissioners; it was held that the effect of this was to absolve from personal liability to an action persons who *bonâ fide* did some act under the direction of the commissioners which but for that clause would subject them to an action (*d*).

Hodgkinson v. *Fernie.*

Where a vessel of the royal navy, towing two transports, anchored by order of the admiral, and the captain ordered the vessels in tow to hold on by their warps, and afterwards a breeze sprung up and one of the transports swinging to it came into collision with another transport in another column, and the captain stated in evidence that after the order to hold on by the warps it would have been proper for the master of the transport to let go his anchor if anything occurred which would have made it dangerous to his own or other ships if he did not do so: it was held in an action against the owner of the transport for damage done by the collision, that the judge was right in leaving it to the jury to say whether the master was not guilty of negligent seamanship in not dropping his anchor when the wind changed (*e*).

(*a*) *Barry* v. *Arnaud*, 10 A. & E. 646. And see *Barrow* v. *Arnaud*, 8 Q. B. 595, where it was not even suggested that the defendant was not liable to be sued, if the duty claimed in that case was excessive.

(*b*) 6 T. R. 646.

(*c*) 6 T. R. 224.

(*d*) *Ward* v. *Lee*, 26 L. J., Q. B. 142.

(*e*) *Hodgkinson* v. *Fernie*, 26 L. J., C. P. 217.

CHAPTER VII.

THE SERVANT'S CHARACTER.

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THE CHARACTER—DEFAMATION.

"THE giving a character of a servant," says the learned author of the Treatise on Slander (*a*), "is one of the most ordinary communications which a member of society is called on to make, but it is duty of great importance to the interests of the public; and in respect of that duty a party offends grievously against the interests of the community in giving a good character where it is not deserved, or against justice and humanity in either injuriously refusing to give a character, or in designedly misrepresenting one to the detriment of the individual."

Master not bound to give any character.

It is clear, however, that in the absence of any specific agreement to that effect, there is no *legal* obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so. Where, therefore (*b*), an action was brought by a servant against her master for wholly refusing to give her any character whatever, on dismissal, by reason of which refusal one S. refused to hire her, Lord Kenyon said, the action could not be supported; that in the case of domestic and menial servants there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it.

Carrol v. *Bird.*

When given, the communication is privileged;

And where a master does give a discharged servant a character (*c*), what he says or writes upon the subject to a person *bonâ fide* inquiring is, in general, looked upon as a *privileged*

(*a*) Starkie on Slander, vol. i. 293.

(*b*) *Carrol* v. *Bird*, 3 Esp. 201.

(*c*) Where A., who had been servant to G., applied to D. for a situation, and D. agreed to take her, if, in answer to a letter written to G., a satisfactory reply was received. D. wrote to G. for A.'s character, and G. answered the letter by post, directing the reply to D.: but A., wishing to intercept the letter, went to the post office, stated that she was D.'s servant, obtained the letter and then burnt it. It was held by the fifteen judges that this was larceny, *R.* v. *Jones*, 2 Carr. & K. 236; *S. C.* 1 Den. C. C. 188.

communication (*d*), and no action whatever can be maintained by the servant (*e*) against him on account of it, if done *bonâ fide*, and without any malicious feeling on his part, against his late servant. It is a mistake to suppose that the law allows this privilege only for the benefit of the *giver* of the character. It is of importance to the *public* that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that the communications are protected (*f*).

unless express malice can be proved.

In order to support any action in respect of a character given by a master to a servant, it must be proved that the character was false, and also that it was *maliciously given*. It is not sufficient merely to prove that the character was false, if given *bonâ fide*, for, as observed by Lord Denman in *Fountain* v. *Boodle* (*g*), even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind (*h*). If, however, the party giving the character *knows* what he says to be untrue, that may deprive him of the protection which the law throws around such communications when made *bonâ fide* (*i*).

Mere falsehood not sufficient.

Implied malice not sufficient.

In ordinary cases of slander the law implies such malice as is necessary to maintain the action, and, therefore, in such cases, it is

(*d*) The principle seems to be that defamatory words are *primâ facie* malicious: some occasions rebut the presumption of malice: those are called cases of privileged communication. If the words be more defamatory than the occasion require, that again raises the presumption of malice. *Per* Erle, C. J., in *Cooke* v. *Wildes*, 5 E. & B. 335.

(*e*) As to actions by the *receivers* of false characters against the givers, see *post*.

(*f*) *Per* Wightman, J., in *Gardner* v. *Slade*, 13 Q. B. 801.

(*g*) 3 Q. B. 12, *post*, p. 254; snd see *Harris* v. *Thompson*, 13 C. B. 333.

(*h*) In *Harris* v. *Thompson*, *ubi supra*, Williams, J., said, "Few rules of law are of greater practical importance than that which requires proof of express malice, where the words are spoken under circumstances which make the communication privileged."

(*i*) *Per* Lord Ellenborough, C. J., in *Hodgson* v. *Scarlett*, 1 B. & Ald. 240. The servant, if charged with dishonesty and misconduct in the defendant's service, is at liberty to prove his good character and conduct in former services, since general character is in some respects in issue. *King* v. *Waring*, 5 Esp. 13. So the plaintiff may prove by the evidence of other servants in the same family, that whilst he remained in the defendant's service he conducted himself well, and that no complaints of the nature ascribed to him by the defendant then existed, 3 B. & P. 589. The tendency and bearing of this evidence is to show that the defendant *knew* that the character which he gave was false: the plain reason for this is, that the knowledge of misconduct frequently rests with the defendant himself, and being unable to prove it by the testimony of others, if the general presumption (of *bona fides* on the part of his master) were to operate against him he would be left

sufficient to charge that the defendant spoke the words complained of *falsely;* it is not necessary to state that they were spoken *maliciously* (*j*). But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask, or have a right to expect it, *malice in fact must be proved* by the plaintiff (*k*). Malice in fact must be proved.

Therefore, where an action (*l*) brought by a servant against her former mistress for saying to a lady who came to inquire her character, that "she was saucy and impertinent, and often lay out of her own bed, but was a clean girl, and could do her work well;" though the servant proved that she was by this means prevented from getting a place, yet, *per* Lord Mansfield, this is not to be considered as an action in the common way for defamation by words, but that *the gist of it must be malice, which* is not implied from the occasion of speaking, but *should be directly proved;* that it was a confidential declaration and ought not to have been disclosed. But if without ground, and purely to defame, a false character should be given, it would be a proper ground for an action. The same learned judge, on several other occasions, laid down similar law. And in all subsequent cases such has been universally considered to be the rule (*m*); the struggle on the part of the plaintiff in actions for defamation by a servant against a master being, generally, to show that the words complained of were uttered under such circumstances as showed express malice on the part of the defendant. *Edmonson* v. *Stevenson.* Since followed.

"The rule," said Lord Campbell, C. J., in *Taylor* v. *Hawkins* (*n*), "is, that if the occasion is such as will repel the presumption of malice, then it is a privileged communication, and *it lies on the party complaining to show that malice* existed, and, if he does not show that by evidence, then it is the office of *Taylor* v. *Hawkins.*

without defence. To prevent such inconvenience the law requires malice to be proved from other sources. In case, however, the plaintiff should be able expressly to prove that the defendant was aware of the falsity, no further proof of malice would be requisite; nor indeed could stronger proof of it be adduced than that the defendant had given a character of the plaintiff injurious to his reputation, with a full knowledge that it was untrue, 2 Stark. on Sland. 58.

(*j*) Styles, 392; *Mercer* v. *Sparkes,* Owen, 51; Noy, 35; and see *per* Le Blanc, J., in *R.* v. *Creevey,* 1 M. & S. 282; *Rowe* v. *Roach,* 1 M. & S. 304.

(*k*) See *per* Bayley, J., in *Bromage* v. *Prosser,* 4 B. & C. 254, 256; 1 Stark. on Slander, 292.

(*l*) *Edmonson* v. *Stevenson,* Bull. N. P. 8.

(*m*) See *Hargrave* v. *Le Breton,* 4 Burr. 2425; *Weatherston* v. *Hawkins,* 1 T. R. 111; *Lowry* v. *Aikenhead,* Mich. T. 8 Geo. 3, cited in *Rogers* v. *Clifton,* 3 B. & P. 594; see *per* Tindal, C. J., in *Hooper* v. *Truscott,* 2 Bing., N. C. 457; and *Smith* v. *Thomas,* 2 Bing., N. C. 381. In *Child* v. *Affleck,* 9 B. & C. 406, Parke, J., said, "The rule laid down by Lord Mansfield in *Edmonson* v. *Stevenson,* has been followed ever since." And see the cases cited, 1 Wms. (Saund.) 130.

(*n*) 16 Q. B. 308; *S. C.* 20 L. J., Q. B. 313; and see *per* Lord Denman, C. J., in *Kelly* v. *Partington,* 4 B. & Ad. 702.

the judge to say that there is no evidence to go to the jury, and to nonsuit, or direct a verdict for the defendant. If that were not so, the question must be left in every case to the jury, and they might be justified in finding a verdict for the plaintiff. So that, if a man gives a character to a servant fairly and honestly, still it must be left to the jury to say whether or not there was malice; and it would be competent to them to find a verdict with damages in a case where nothing had been done beyond fairly giving a character to a servant."

It is not sufficient that facts are *consistent with* malice.

It is not, however, sufficient to entitle the plaintiff to have the question of malice left to the jury, that the facts proved should be merely *consistent with* the presence of *malice*, as well as with its absence; for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice it ought to be left to the jury, would be, in effect, to say that the jury might find malice in any case in which it was not *disproved*, which would be inconsistent with the admitted rule that in cases of privileged communications malice must be proved, and, therefore, its absence presumed till such proof is given. It is certainly not necessary in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence (*o*).

Cases showing express malice.

Since, then, the liability of a master to an action for defamation, in consequence of the character given by him to a discharged servant, so completely depends upon the existence of express malice on his part, it will be desirable to set before the reader some of the cases in which the circumstances have been such as to show express malice on the part of the master, who has accordingly in such cases been held liable (*p*).

Rogers v. *Clifton*.

In *Rogers* v. *Clifton* (*q*) it appeared that the plaintiff, having been hired as a servant by the defendant, lived six months in his service, when the latter turned him away without giving him a month's warning, in consequence whereof the plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal the defendant procured a police-officer to put the plaintiff out of the house, and employed his attorney to settle his wages with him. Imme-

Officiously

(*o*) *Per* Maule, J., in *Somerville* v. *Hawkins*, 10 C. B. 583; *S. C.* 20 L. J., C. P. 133; and see *Taylor* v. *Hawkins*, *ubi supra*; *Harris* v. *Thompson*, 13 C. B. 333.

(*p*) The circumstances under which the master and servant parted, any expressions of ill-will uttered by the former, his officiously acquainting others with the servant's misconduct, without any previous application to him for a character, are all facts which are proper for the consideration of a jury, to enable them to form their opinion upon the question of intention, see 2 Stark. on Slander, 58.

(*q*) 3 B. & P. 587.

diately after this the defendant called on M., with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner, that the defendant had discharged him, but he refused to go without a month's wages, and the defendant therefore desired M. not to give him another character. The plaintiff afterwards offered himself to H., who wrote to the defendant for his character, and the defendant in reply said he was "a bad-tempered, lazy, impertinent fellow," and had given him a great deal of trouble, whereupon H. refused to hire the plaintiff. The plaintiff brought an action against the defendant for defamation, and proved, by servants of the family, that, while in the defendant's service, he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. The jury found a verdict for the plaintiff, and a rule nisi, which had been obtained by the defendant to enter a nonsuit, was afterwards discharged, on the ground that the character given by the defendant was proved to be untrue, and his conduct shown to be malicious by his officious interference in going to the plaintiff's former master.

calling on former master;

and bad character given to person about to hire:

where no previous complaints made.

In *Pattison* v. *Jones* (*r*) the defendant having discharged his servant, the plaintiff, and hearing that he was about to be engaged by B., wrote to B. and informed him that he had discharged the plaintiff for misconduct. B. having desired further information, the defendant wrote a second letter to him, stating the grounds on which he had discharged the plaintiff. It was held, in an action by the servant against the defendant for the libel contained in the *second* letter, that assuming the letter to be privileged, it was a question for the jury whether the second letter was written *bonâ fide*, or maliciously with intent to injure the plaintiff, and the jury having found a verdict for the plaintiff, the court refused to disturb it, Bayley, J., stating it as his opinion that a master "may (when he thinks that another is about to take into his service one whom he knows ought not to be taken) set himself in motion and do some act to induce that other to seek information from and put questions to him. The answers to such questions, given *bonâ fide* with the intention of communicating such facts as the party ought to know will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for a jury whether the defendant has acted *bonâ fide* intending honestly to discharge a duty; or whether he has acted maliciously, intending to do an injury to the servant."

Pattison v. *Jones*.

Information volunteered to person about to hire;

and second letter.

In *Kelly* v. *Partington* (*s*) the plaintiff had been in the defendant's service as shopwoman but was discharged. S., who was going to hire the plaintiff, inquired her character of the defendant, who charged her with having secreted money taken from his till, and also stated that when she came into his service she borrowed half a sovereign of her mother, and that before she had been there two months and before she received any wages,

Kelly v. *Partington*.

Dishonesty charged to person about to hire;

(*r*) 8 B. & C. 578. The action was brought on the *second* letter.

(*s*) 4 B. & Ad. 700.

and repeated to relation of servant;

she paid her mother the money and made her a present of a sovereign. The plaintiff's brother-in-law, A., afterwards called upon the defendant for an explanation of the words, when he repeated the same charges, whereupon A., with reference to the other statement, observed that the defendant no doubt made entries in some book of the times at which he paid his servants' wages, and that on reference to it he would probably find that he was mistaken in what he had asserted. The defendant then went to his desk, took out a memorandum-book and looked at it; after which he turned to A. and asked, "Do you know when she received her wages?" A. answered "No;" but he would go by the defendant's account, as that was likely to be correct. The defendant then said, "If you do not know I am not going to tell you," and put the book into the desk again. A. upon this made some allusion to intended proceedings at law, and said he considered the case of theft as trumped up, to which the defendant made no answer, but "grinned" in a contemptuous manner at A.; and upon his remonstrating, and observing that if the plaintiff had not had friends she might have gone upon the town, the defendant said (speaking of himself and his wife), "What is that to us?" Evidence was then given in contradiction of the defendant's statement as to the time when the plaintiff repaid the half sovereign. Upon this case the defendant's counsel urged that the plaintiff should be nonsuited, on the ground that there was no proof of express malice. But Patteson, J., before whom the case was tried, refused to nonsuit the plaintiff, and in the following term an application on the part of the defendant for leave to enter a nonsuit was refused by the Court of Queen's Bench, as there were circumstances, though slight, from which malice might be inferred.

with contemptuous grin.

Slight evidence of malice.

Fountain v. *Boodle*.

False statement made to person about to hire.

In *Fountain* v. *Boodle* (*t*), the plaintiff, a young person who had been educated for a governess, was engaged by the defendant, Mrs. B., in November, 1839, as daily governess to instruct young children, which employment she retained about fourteen months. During that period D., sister-in-law of the defendant, being in want of an instructress for her children, Mrs. B. recommended the plaintiff to her for that purpose; and in September, 1840, S. wanting a person to instruct his wife, a very young lady, in the several branches of a plain English education, Mrs. B. recommended the plaintiff to him for that purpose. From the 19th to the 23rd of November, 1840, the plaintiff was prevented by illness from attending at Mrs. B.'s; and on her return to her employment there, a letter was given to her from Mrs. B., dated 19th November, informing her that her services would not be required beyond the 19th of December, but without assigning any reason. At the latter date she ceased accordingly to instruct the defendant's children. In September, 1841, plaintiff was about to be engaged by N., as instructress for her children; and N. applied by letter to Mrs. B. respecting the plaintiff's character, in the following terms, "I shall be obliged by your informing me whether you consider her com-

(*t*) 3 Q. B. 5.

potent to undertake the instruction of little girls from nine to thirteen years of age (with assistance in music only), and if you were perfectly satisfied with her tuition; also for what reason you declined her attendance; and whether you consider her a person of good principles and ladylike deportment, of a mild but firm disposition. I will thank you to reply to this question at your earliest convenience: and for any other observations you may think proper to make, I shall feel obliged." To this application Mrs. B. replied in the following letter, the alleged libel:—"In answer to your inquiries respecting Miss F., I beg to say she had to instruct five of my children from three to nine years old; it is about a twelvemonth since I employed her, and she taught them as a daily governess for fourteen months, and engaged herself to teach everything but music, which she knew nothing of: and I parted with her on account of her incompetency and not being ladylike nor good-tempered. When I engaged her she recommended a young friend of hers to teach the music, whom I was much pleased with, and I discontinued *her* services when I took another governess." To this was added a postscript, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." N., in consequence, broke off her engagement with the plaintiff, which was the special damage complained of. The two applications alluded to in the postscript were those of D. and S. General evidence was given of the plaintiff's competency, good temper and manners by her personal friends. There was no direct evidence of the ground of dismissal. The defendant's counsel contended that the communication was privileged: but Lord Denman, C. J., refused to nonsuit the plaintiff, and left it to the jury to say whether, looking at the whole case, there was sufficient proof that Mrs. B., in writing the letter, had been influenced by some improper feeling towards the plaintiff to make a false statement knowingly. And they found a verdict for the plaintiff. In the following term a rule for a new trial, on the ground of misdirection, and of the verdict being against the weight of evidence, was applied for but refused. And Lord Denman, C. J., said, "A character *bonâ fide* given to a servant of any description is a privileged communication, and in giving it *bonâ fides* is to be presumed. Even though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs; one may be, that the statement is false to the knowledge of the party making it. Up to this point the summing up was not complained of: but another part of it was brought before the court as objectionable. The misstatement here imputed was, that the defendant had discharged the plaintiff by reason of her faults enumerated in the letter. This could be *known* to nobody besides the defendant, but she might have shown the probability of that being the real motive from remonstrances made by her during the plaintiff's attendance, or complaints at its being terminated. I told the jury to the effect that if the plaintiff brought any evidence of wilful untruth, some evidence of the

Left to jury to say if made *knowingly*.

contrary might be reasonably expected when the nature of the case allowed it. This is a general proposition applicable to every form of action and to evidence of all kinds." "The court wished for time to consider whether there was in the present case any evidence of wilful falsehood in the character given." His lordship then went through the evidence, and added, "Here was undoubtedly *some* evidence of the injurious character being dictated by some indirect motive. Of course, then, it must be laid before the jury. But the learned counsel contends that it is so extremely slight, that though uncontradicted in any particular, the jury ought to have found a verdict against its sufficiency. He observes that the privilege is but illusory, if circumstances so minute can be raised into proof of malice. Much more illusory would it be to hold that there was evidence on which the jury must decide, but that they must decide one way or the verdict cannot stand. We cannot place ourselves in their stead and impose our own judgment upon them. They have advantages for attaining the truth which we do not possess, and are the proper tribunal for that purpose. They were bound to decide upon the weight of the evidence laid before them, and we cannot say that they have done wrong in the present instance."

Rumsey v. *Webb.*

Information of servant's conduct given to master by a neighbour.

In a case where (*u*) it appeared that the plaintiff was servant to W. C., whose wife called on Mrs. Webb, and asked how her (Mrs. C.'s) sister had behaved to the plaintiff during Mrs. C.'s absence in the country; whereupon Mrs. Webb said, "Mrs. C., you are not aware what kind of servant you have; if you were you would not keep her, for I can assure you she is often out with our married man; she was out with him last Sunday morning, and when you were in the country she was out gossiping till eleven or twelve o'clock at night; upon which the mistress discharged her servant; and it appeared that Mrs. C. had, on a previous occasion, asked Mrs. Webb to look after her servant. Coltman, J., left it to the jury to say whether the words were spoken with the honest intent of giving a neighbour important information of what was going on in his family, or whether it was done in an idle, gossiping and malicious spirit. They found a verdict for the plaintiff, and the court afterwards refused to disturb their finding.

Justification pleaded, but not proved or abandoned.

The defendant's conduct in putting a justification upon the record which he does not attempt to prove, and will not abandon, may be taken into consideration as proving malice, and aggravating the injury. And if the defendant's conduct in that respect may at all affect the verdict, every other part of his conduct may equally be laid before the jury; refusing to make reparation for unjustifiable slander may have that effect; and the malice proved to exist at the time of the trial, but connected with the subject-matter of it, may well be believed to have existed at the time of speaking the words (*x*).

(*u*) *Rumsey* v. *Webb*, Carr. & M. 104.

(*x*) *Simpson* v. *Robinson*, 12 Q. B. 511. See further on this point, *Wilson* v. *Robinson*, 7 Q. B. 68; *Warwick* v. *Foulkes*, 12 M. & W. 507.

Gilpin v. *Fowler.*

Pastoral letter distributed by a rector, about his schoolmaster, not privileged, evidence of malice.

The plaintiff was master of a national-school in a parish of which the defendant was rector, and also one of the managers of the school. The defendant requested the plaintiff to teach a Sunday-school in connexion with the national-school, which he declined on account of the increased labour, and was, in consequence, dismissed. The plaintiff being about to set up a school on his own account in the same parish, the defendant wrote and distributed in that and the adjoining parish a pastoral letter, in which he denounced the plaintiff's conduct as unchristian-like, and warned his parishioners against affording any countenance to the projected school, either by subscriptions, or by sending their children to it. It was held by the Exchequer Chamber that the communication was not privileged, and also that there was evidence for the jury of express malice. They also held that, in determining the question of malice, the jury might look at the libel itself (*y*).

Cooke v. *Wildes.*

Deputy clerk of the peace reporting conduct of tradesmen to finance committee.

The defendant (*z*) was deputy clerk of the peace, and, as such, submitted to the quarter sessions (*a*) his account of the expenses of printing the register of county voters; and, previously to this, he addressed a letter to the finance committee of magistrates, explaining why he had taken away the contract for printing from the plaintiffs (who were printers formerly employed), stating therein that he thought it his duty to report the circumstances, "particularly as the character and conduct of the persons who are chiefly employed by the county as printers and stationers are involved." The letter then stated circumstances to show that, as appeared from a comparison with terms offered by other printers, the plaintiffs had demanded too high terms upon grounds not supported by facts, and it concluded, "under the circumstances I have stated, it will be seen that I had no alternative but to adopt the course I have taken, rather than submit to what appears to have been an attempt to extort a considerable sum from the county by misrepresentation." It was held that, although the occasion was privileged, there was evidence *from the language of the letter*, that there was express malice.

Libel itself may be looked at.

In the last two cases it was also decided, as indeed had been previously laid down (*b*), that in considering the question of express malice, the libel complained of may itself be looked at, although it be a privileged communication.

Exceeding occasion, evidence of malice.

In Ireland (*c*), and America (*d*) also, it has been laid down that, although expressions used beyond what the occasion warranted would not divest a privileged communication of its privilege, yet that such expressions would be evidence of malice in fact.

Facts *not* showing malice.

But in the following cases (*e*) it was held that the facts proved were *not* evidence of malice. The plaintiff had been in the

(*y*) *Gilpin* v. *Fowler*, 9 Exc. 615.

(*z*) *Cooke* v. *Wildes*, 5 E. & B. 328; *S. C.* 24 L. J., Q. B. 367.

(*a*) Under stat. 2 & 3 Will. 4, c. 45, ss. 55, 56; and 6 & 7 Vict. c. 18, ss. 49, 54.

(*b*) In *Wright* v. *Woodgate*, 2 Cr. M. & R. 573.

(*c*) *Ruckley* v. *Kiernan*, 7 Ir. C. L. Rep. (1857), 75.

(*d*) *Gassett* v. *Gilbert*, 6 Gray, 94.

(*e*) *Child* v. *Affleck*, 9 B. & C. 403; and see *Dixon* v. *Parsons*, 1 Fost. & F. 24.

Child v. *Affleck.*

service of the defendants, Mrs. A., having, before she hired her, made inquiries of two persons, who gave her a good character. The plaintiff remained in the defendant's service a few months, and was afterwards hired by another person, who wrote to Mrs. A. for her character, and received the following answer, the alleged libel:—"Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written Mrs. A. went to the persons who had recommended the plaintiff to her, and made a similar statement to them. But there was no evidence of the good conduct of the plaintiff at the period to which the letter referred. It was held that the letter was privileged, and the other communications having been made to persons who had recommended the plaintiff, were not evidence of malice. The plaintiff was nonsuited, and two of the learned judges (*f*) expressed opinions that Mrs. A. would have stopped short of her duty in withholding the information contained in the latter part of the letter.

Reports heard since dismissal;

repeated to person who recommended servant.

Gardner v. *Slade.*

Answers to inquiries induced by defendant as to facts discovered since character given.

The plaintiff had been cook in the defendant's family, and left (*g*). M. applied for her character at a time when Mrs. Slade was ill. Mr. S. answered the application, and gave the plaintiff a good character, whereupon M. hired her. Mrs. S. recovered, and having occasion to write to M. about another cook, asked about her dealings with respect to meat, &c., in the kitchen, and ended, "I mention this particularly, having discovered that I have been much imposed upon in this way a short time ago." M. called on Mrs. S., and she in conversation spoke the words complained of, which were to the effect that she suspected that the conduct of the plaintiff, when in her service, was not honest. After action brought she wrote to M.

(*f*) *Bayley* and *Littledale*, JJ.

(*g*) *Gardner* v. *Slade et ux.*, 13 Q. B. 796. See also *Owens* v. *Roberts*, 6 Ir. C. L. Rep. (1856), 386, where Monahan, C. J., said, "We are of opinion that if a person, having an interest in obtaining information as to the affairs of another person, makes a *bonâ fide* application to a third person for that purpose, and the latter in reply to such inquiry gives the information required, such a communication is privileged: for the fact of such an inquiry having been made, not officiously but *bonâ fide* and by a person interested, imposed upon the person of whom the inquiry is made an obligation either not to speak at all upon the subject, or if he does so, to speak the truth. And we are of opinion upon all the authorities, that in the case of a person making an inquiry of another who is the acquaintance of the third person as to whom the inquiry is made, and from his position likely to be acquainted with the affairs of the latter, and where the party making the inquiry is or is about to become a creditor of such third person, that such a communication is privileged."

saying, "You will remember that I imputed no dishonesty; for of that I have no knowledge." The jury found that the defendant by her letter intended to induce inquiries on B.'s part as to the plaintiff, and found a verdict for the plaintiff. But the court afterwards ordered a nonsuit to be entered, on the ground that the communication was privileged, and there was no evidence of malice. And Lord Denman said:—"I think the privilege which protects a master in giving a character lasts as long as anything is discovered before unknown to the master: as, for instance, if I give a good character to a servant, and next day discover that the servant is dishonest; surely in such a case it becomes my duty to communicate my discovery to the person to whom I have given the character." And Coleridge, J., added, "Nobody can doubt that."

Harris v. *Thompson.*

Facts learnt at one board of directors communicated to another by member of both boards.

The plaintiff (*h*) was secretary of the Brewers' Insurance Company, and being charged with misconduct was called upon to attend a board of directors to explain, but declined to do so, whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross misconduct and dismissing him. The defendant, who was a director of that company and also of another company called the London Necropolis Company, communicated the facts of the plaintiff's dismissal from the service of the former company "for gross misconduct," at a board meeting of the latter company, and proposed a resolution to dismiss him from his employment as their auditor, and in answer to an inquiry from the chairman, said the misconduct consisted in "obtaining money from the solicitors of the company under false pretences and paying a debt of his own with it;" and upon the plaintiff's appearing on a subsequent day with his attorney before the board to meet the charges against him, the defendant refused to go into them. It was held that such refusal was no evidence of malice; as being consistent with *bona fides*, *bona fides* must be presumed until the contrary was proved.

Manby v. *Witt.*

Master telling one servant he was discharged because he and another had robbed him.

The defendant (*i*), on returning home late one night, heard that the footman had been giving away provisions, which he had obtained from the cook, and thereupon dismissed them both. Next morning they came together to the defendant and asked his reason for dismissing them; he at that time declined to give any reason, but on another occasion, in answer to similar inquiries, told M. that he discharged him "because he and the cook had been robbing him," and told E. that he discharged her "because she and the footman had been robbing him." Each brought an action against the defendant, but both were nonsuited, as it was held that there was no evidence of malice; and Jervis, C. J., said:—"The malice that will deprive a communication of this sort of the excuse arising out of the occasion of the speaking of the words must be such as to induce the court or any reasonable person to conclude that the occasion has been taken advantage of to give utterance to an unfounded charge."

(*h*) *Harris* v. *Thompson*, 13 C. B. 333.

(*i*) *Manby* v. *Witt*, *Eastmead* v. *Witt*, 18 C. B. 544.

Court to decide on *privilege*.

From these cases the reader will have deduced the rule which prevails in cases of this sort, that it is the duty of the court to decide whether or no the communication containing the defamatory matter complained of comes within the class of privileged communications (*k*); and for the jury to decide as to the existence or non-existence of any malicious motives in the mind of the defendant in making it (*l*).

Jury on *malice*.

Part privileged; part not.

Where part of the communication is privileged and part is not, the former, of course, will not protect the latter (*m*).

How far communications by and to other persons than masters are privileged.

In most of the cases hitherto mentioned, the alleged defamation has taken place in some communication between a *former master* and a *person about to hire* a discharged servant. But it frequently happens that defamatory opinions are uttered and expressions used with reference to the character of servants by their masters in communication with other persons, and by other persons in communication with their masters. It is important, therefore, to inquire how far such communications are within the protection which, as we have seen, the law throws around communications made by the master to a person inquiring the character of a discharged servant; in other words, how far such communications are privileged.

It must be observed, however, that, as the reason why communications of the nature last referred to are held to be privileged, does not arise from the existence of the relationship of master and servant between the parties defamed and defaming, but from principles of public policy and convenience: it would seem to be more consistent with those principles that the rule should be co-extensive with them, than that it should be confined to one particular class of cases, to which, in common with others, they are applicable. Accordingly, it will be found that a variety of communications come within the class which are held to be privileged, and that the cases already mentioned are to be regarded rather as examples of the application of a general rule to a particular class of cases, than as forming of themselves a class from which a rule may be deduced. The general rule is, indeed, far more extensive in its application, and cannot, perhaps, be better expressed than is done by Lord Wensleydale, in *Toogood* v. *Spyring* (*n*).

Toogood v. *Spyring*.

"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious *unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned.* In such cases

(*k*) In *Wenman* v. *Ash*, 13 C. B. 845, Maule, J., said, "Though more a question of fact in each particular case than a question of law, the courts have assumed the jurisdiction of deciding it." See *Cooke* v. *Wildes*, 5 E. & B. 328, *ante*, p. 257; and *Gassett* v. *Gilbert*, 6 Gray, 94.

(*l*) But see *Taylor* v. *Hawkins*, *ante*, p. 251; *Gilpin* v. *Fowler*, 9 Exc. 623.

(*m*) *Warren* v. *Warren*, 1 C. M. & R. 250; *Tuson* v. *Evans*, 12 A. & E. 733; *Clarke* v. *Roe*, 4 Ir. C. L. Rep. 1.

(*n*) 1 C. M. & R. 193, *post*, p. 269.

the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

It is not, however, necessary here to follow out the application of the rule thus laid down to all the cases to which it has been applied (*o*). It will be sufficient to lay before the reader those cases which bear more immediately upon the subject now under consideration, to which it has been held applicable. And in doing so, it will be convenient to consider,

I. Communications made in the discharge of a public duty;
II. Communications made in the discharge of private duty, and
III. Communications made by a person in the conduct of his own affairs in matters where his interest is concerned.

I. Communications made in the discharge of a *public* duty.

In course of judicial proceedings.

To this class may be referred the cases in which communications made in the course of judicial proceedings (*p*) have been held to be privileged on the ground of public policy, which requires that whatever is given as evidence in a court of justice should be free from being made the subject of an action. False evidence may be punished by indictment for perjury.

Trotman v. *Dunn.*

In *Trotman* v. *Dunn* (*q*), the facts were shortly these:—The plaintiff, on his return from transportation, served the defendant as journeyman baker, but was suddenly dismissed by him. He then claimed a week's wages, and to enforce this demand summoned the defendant before a Court of Conscience. While they were attending there, the defendant said of the plaintiff, "He has been transported before, and ought to be transported again. He has been robbing me of nine quartern loaves a week." And the plaintiff brought this action. It did not appear distinctly in what stage of the proceedings the words complained of were spoken, or to whom they were addressed. For the defendant, it was contended that the words having

(*o*) As to how far communications from master to clerk are privileged; and whether a court of equity would grant an injunction to restrain a former clerk from disclosing his master's dealings, see *Gartside* v. *Outram*, 26 L. J., Ch. 113.

(*p*) See 1 Starkie on Slander, 239, 254; *Revis* v. *Smith*, 18 C. B. 126; *Henderson* v. *Broomhead*, 28 L. J., Exc. 360. Such communications may, however, where the circumstances admit of it, be made the subject of an action for *malicious prosecution*. See *Cutler* v. *Dixon*, 4 Rep. 14 b. Want of jurisdiction in the court before which the proceedings take place, appears to make no difference in the privilege. See the cases cited in the note to *Buckley* v. *Wood*, 4 Rep. 14 b (Thomas and Fraser's edit.); *Lake* v. *King*, 1 Wms. Saund. 131 b, and note (*k*); 1 Stark. on Sl. 253. As to how far a magistrate or judge is privileged in his observations, see *Kendillon* v. *Maltby*, Carr. & M. 402.

(*q*) 4 Camp. 211.

been used in a court of justice, were privileged. And Lord Ellenborough, C. J., said, "If it had been proved that the defendant spoke these words in opening his defence to the Commissioners of the Court of Conscience, I should immediately have directed a nonsuit. This would have been a privileged communication, and the words could not be considered as spoken maliciously in the manner and form stated in the declaration. If the plaintiff had been robbing the defendant, the latter was justified in dismissing him immediately, and no claim to a week's further wages could exist. The Court of Conscience had to decide upon the propriety of the ground of dismissal. Therefore, if the defendant used the words in a judicial mode, for the purpose of his defence, he is justified. On the contrary, if he spoke them *ad invidiam*, and in a calumniatory manner, they are actionable, though uttered in the room where the Court of Conscience was sitting." The defendant had a verdict.

Slanderous words spoken to policeman, on giving servant in charge.

Johnson v. *Evans*.

Slanderous words spoken to a constable on giving a servant into custody, on a charge of stealing, have also been held to come within the same category. Thus, in *Johnson* v. *Evans* (*r*), which was an action for slander, the words were, "She is a thief, and tried to rob me of part of her wages." The plaintiff had been servant to the defendant. Upon a dispute taking place he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and used the words as laid, but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable, in order to take her into custody, he used the same words to the constable when he came, to whom he meant to have given her in charge, but which in fact he did not do. It appeared from the evidence of the constable, that the words were addressed to him in his character of constable, and in the course of the charge and complaint which the defendant made to him against the plaintiff. Lord Eldon, C. J., nonsuited the plaintiff, saying, that "Words used in the course of legal or judicial proceeding, however hard they might bear on the party of whom they were used, were not such as would support an action for slander. In this case they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish it. It would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them, or preferring their complaint, should be deemed actionable."

To this class may also perhaps be referred the cases already mentioned, in which communications made by a master respecting the character of a discharged servant have been held to be privileged, though some may think that they more properly belong to the class next to be considered, viz.:—

II. Communications made in the discharge of a *private* duty.

In this class may be included, in addition to the cases already

(*r*) 3 Esp. 32; but see *Smith* v. *Hodgkins*, Cro. Car. 276.

mentioned, in which a character given to a discharged servant has been held to be a privileged communication, the cases in which masters, after having given a discharged servant a bad character, have *repeated* it to the friends or relations of the servant upon being called upon by them for an explanation of the bad character given, which has lost the servant a place. Such communications have been held to be privileged, when made *bonâ fide;* though, as we have already seen in one such case (*s*), the repetition of a bad character, when accompanied by a "contemptuous grin," was held to be slight evidence of malice.

Weatherston v. Hawkins.

Letter written to friend of servant, repeating bad character given to person about to hire.

In *Weatherston* v. *Hawkins* (*t*), the plaintiff brought an action against his former master for publishing the following letter to C., the plaintiff's brother-in-law, respecting the plaintiff's character as a servant. "Two days I gave him money to go into the city and buy books. When he came home I desired him to reckon up his account; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article, and in one, a book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day the very same affair. And both these days my neighbour Metcalf was in my shop, and knows it well, and said he would not keep such a man a day, or something to that purpose. Two magazines he charged two shillings for binding, the people received no more than 1*s.* 8*d.*, and say he paid no more. This I can prove." It appeared that the plaintiff had been in the service of the defendant, and was by him turned away. Rogers, to whom the plaintiff was recommended as a servant, applied to the defendant for a character, which, not being good, Rogers declined to take him. Upon this C. called repeatedly upon the defendant, upon which the above letter was written, in order to prevent an action for the words spoken to Rogers by the defendant. But the present action was brought. It was, however, held by Lord Mansfield, C. J., and other judges, that it would not lie, as, instead of the plaintiff's showing the libel complained of to be false and malicious, it appeared to be incident to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought (*u*).

Taylor v. Hawkins.

Charge of dishonesty made to

And so in *Taylor* v. *Hawkins* (*v*), it appeared that the plaintiff was a shopman of the defendant, and that the defendant, having a suspicion that he had embezzled money in the course of his employment, sent for the plaintiff, and, in the presence of

(*s*) *Kelly* v. *Partington*, 4 B. & Ad. 700, *supra*, p. 253.

(*t*) 1 T. R. 110.

(*u*) In *King* v. *Waring*, 5 Esp. 15, Lord Alvanley refused to allow a letter to be given in evidence, which had been procured by the plaintiff from the defendant by means of another letter, not written with a fair view of inquiring a character, but to procure an answer upon which to ground an action for a libel; and see 3 B. & P. 592.

(*v*) 20 L. J., Q. B. 313; *S. C.* 16 Q. B. 308; and see *Harris* v. *Thompson*, 13 C. B. 333, *ante*, p. 259.

person about to hire; a friend, Mr. T. uttered the words complained of in the first count, which were, "You pocketed the 5*s.*, and altered the cheque; and you intended to alter the book, but, being busy at the time, it escaped your memory," and immediately afterwards discharged him. After his discharge, the plaintiff being about to enter the service of B., the defendant was referred to for a character, but, in consequence of what the defendant then stated to him, B. declined to take the plaintiff into his employment. Upon this the plaintiff's brother called upon the defendant to inquire why he had given the plaintiff such a character as kept him from obtaining a situation; upon which the defendant said, "What would you do yourself if any of your shopmen or servants robbed you?" to which the plaintiff's brother replied, "I hope my brother has not been robbing you." The defendant then said, "He has robbed me; I believe that he has robbed me for years past; I can prove it from the circumstances under which he has been discharged by me." This last answer was what was complained of by the second count of the declaration. It was held that the occasion on which these communications were made was such as to render them privileged, and that the presence of a third party when they were made did not alone render them not so.

and repeated to friend of servant.

Communications by master to his other servants.

In this class may also be included communications *bonâ fide* made by a master to his *other servants* respecting the character of a discharged servant.

Somerville v. *Hawkins.*

Thus, where (*x*) the plaintiff who had been in the service of the defendant, and had been dismissed on a Thursday on a charge of theft, came on the following Saturday upon the defendant's premises for the purpose of receiving wages which were due to him, and then had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me. Do not speak to him any more in public or in private or I shall think you as bad as him;" this was held to be a privileged communication, and the plaintiff, having brought an action for slander against his master, was nonsuited, Lord Truro ruling, that, in the absence of any other evidence of express malice on the part of the defendant, there was no case to go to the jury; and this ruling was afterwards upheld by the Court of Common Pleas.

Letter written by tenant to his landlord respecting person who wished to be landlord's gamekeeper. *Cockayne* v. *Hodgkinson.*

Communications made by a tenant to his landlord respecting the character of a servant about to be hired by the latter have also been held to be privileged (*y*). Thus, where (*z*) the father of the plaintiff had been for some years gamekeeper to the Marquis of Anglesey, and the plaintiff wished to become his lordship's gamekeeper and overlooker of fences for a farm of which the defendant, an old man, was tenant; and the defendant

(*x*) *Somerville* v. *Hawkins*, 20 L. J., C. P. 131; *S. C.* 10 C. B. 583; see also *Manby* v. *Witt*, *ante*, p. 259.

(*y*) As to how far a communication by a landlord to his tenant reflecting on the character of the tenant's servants is privileged, see *Knight* v. *Gibbs*, 1 A. & E. 43.

(*z*) *Cockayne* v. *Hodgkinson*, 5 C. & P. 543.

sent a letter to the Marquis informing him, amongst other things, that the plaintiff encouraged poachers, and sold game. Mr. Justice Parke left it to the jury to say whether it was the duty of the defendant to make communications to the Marquis in respect of any neglect of duty in his gamekeepers; and said that "If he was desired to do so by the noble Marquis, or his agents, any communication he made would be privileged, if he wrote it *bonâ fide*, and considering that he was doing his duty to the Marquis as his landlord. If it was the duty of the defendant to make the communication, the case falls within the principle of many other cases. To write of another that he is a thief is a libel; but if one gentleman asks another gentleman respecting a servant's character, and he writes that the servant was a thief, he is protected if he acts *bonâ fide*." His lordship also left the case to the jury on the question of malice, and they found for the defendant.

Cleaver v. *Sarraude*.

It may also be proper to mention in this place a case of *Cleaver* v. *Sarraude* (*a*), where, in an action for a libel contained in a letter written confidentially by the defendant to the Bishop of Durham, who employed the plaintiff as steward to his estates, to inform him of certain supposed malpractices on the part of the plaintiff, the judge who presided declared himself of opinion that the action was not maintainable, as the defendant had been acting *bonâ fide*. In that case, however, it is to be observed, that it does not appear in what position the defendant stood with reference to the Bishop of Durham. If he was a perfect stranger to him it would seem, from the subsequent case of *Coxhead* v. *Richards*, to which it is now proposed to call the reader's attention, to be extremely doubtful whether the opinion of the learned judge would now be followed, since no duty or interest on the part of the defendant to communicate to the bishop what he did not *know* to be true appeared.

Coxhead v. *Richards*.

In *Coxhead* v. *Richards* (*b*), the facts were shortly these:— The plaintiff was a mariner, and had the command of a ship belonging to W., of which ship Cass, an intimate friend of the defendant, was mate. Cass wrote to the defendant reflecting in strong terms upon the plaintiff's conduct in a particular voyage, but requesting the defendant *not* to show the letter to W. On receipt of the letter, however, the defendant showed it to a naval friend, one of the elder brethren of the Trinity House, and also to Soames, an extensive shipowner, and, in accordance with their advice, communicated it to W., who immediately superseded the plaintiff in his command, and ceased to employ him. The plaintiff upon this brought an action for libel against the defendant; and the defendant pleaded a justification, but failed to sustain it. And it did not appear that W. had instituted any inquiry into the charges contained in Cass's letter. On the part of the defendant it was contended that the action would not lie, on the ground that the communication of the letter to W. was privileged. And Tindal, C. J., told the jury that the

(*a*) Cited by Lord Ellenborough in *M'Dougal* v. *Claridge*, 1 Camp. 268.

(*b*) 2 C. B. 569; see also *Blackham* v. *Pugh*, 2 C. B. 611; *Bennet* v. *Deacon*, 2 C. B. 628.

occasion and circumstances under which that communication took place, furnished a legal excuse for making it; that the plaintiff, to entitle himself to a verdict, must show malice in fact, and the jury must find for the defendant if they thought the communication strictly honest on his part, and made solely in the execution of what he *believed to be* a duty; but for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from malice against the plaintiff. The jury found for the defendant. And in the following term a rule *nisi* was obtained by the plaintiff for a new trial, on the ground of misdirection. The rule was twice argued in consequence of a difference of opinion amongst the judges; and, ultimately, the four judges before whom the case was argued differed; Tindal, C. J., and Erle, J. (*c*), holding that the communication was privileged, as the defendant *bonâ fide* believed, and had reason to believe, the statement to be true, and that it was his duty to communicate it to the plaintiff's master; and Coltman and Cresswell, JJ., holding that it was *not* privileged, as there was no duty which obliged the defendant to make the communication without ascertaining its truth.

Gassett v. *Gilbert.* Directors' report.

Where the directors of a society (*d*), in their annual report, published a "caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions for them, but had since been dismissed, such publication was held to be justifiable only so far as it was made in good faith, and required to protect the society and the public against the false representations of that person. The question, whether they acted in good faith and did not exceed their privilege, is for the jury.

Philadelphia, &c. Railroad Corporation v. *Quigley.*

In a recent case (*e*) in America, in which a railroad corporation was held liable, in its corporate capacity, for a libel published by its agents in the course of its business and of their employment, it was held to be within the course of its business and the employment of the president and directors for them to investigate the conduct of their officers and agents, and report the result to the stockholders. It was also held, that in the absence of malice or bad faith, a report to the shareholders was privileged, but that such privilege did not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation. And the corporation was held liable in damages for publishing it in that form.

Rule in *Harrison* v. *Bush.*

In *Harrison* v. *Bush* (*f*), a legal canon was propounded by counsel, and adopted by the court, that "a communication made *bonâ fide* upon any subject-matter in which the party

(*c*) And it is said that the opinion of Erskine, J., who retired from the bench, between the first and second argument of the case, was understood to be in favour of the defendant. See the note of the Reporters, 2 C. B. 583; and see acc. *Davis* v. *Reeves*, 5 Ir. C. L. Rep. 79.

(*d*) *Gassett* v. *Gilbert*, 6 Gray (Amer.) Rep. 94.

(*e*) *The Philadelphia, Wilmington and Baltimore Railroad Corporation* v. *Quigley*, 21 How. (Amer.) Rep. 202.

(*f*) 5 E. & B. 348; see also *Dickson* v. *Earl Wilton*, 1 Fost. & F. 419.

communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

III. Communications made by a person in the conduct of his own affairs where his interest is concerned.

Where mutual interest concerned.

Communications of this sort have also frequently been held to be privileged, when made *bonâ fide* with a view to the interests of both the writer and the persons addressed, for if a communication of this sort, which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. Upon this ground a letter written by the defendant to Messrs. W., bankers, charging the plaintiff, who was a solicitor, with improper conduct in the management of their affairs, in which the defendant was himself interested, was held to be privileged (*f*).

M'Doug a Claridge.

Wilson v. *Robinson.*

So a letter written by one part owner of a brig to another part owner, who had recommended the plaintiff as master, reflecting upon the master's conduct, was held to be privileged (*g*).

Martin v. *Strong.*

But words spoken by one subscriber to a charity, in answer to inquiries by another subscriber respecting the conduct of a medical officer of the charity, have been held not to be privileged; and in an action for slander the plaintiff recovered a verdict and damages (*h*). In that case, however, there did not appear to be a sufficient reason for the conversation between the parties to constitute a privileged communication. And in a subsequent case Lord Wensleydale said that if those observations had been made in a matter of contest, and the contest was whether the person slandered should be elected, it appeared to him that it would have been a privileged communication. The case alluded to is *Kine* v. *Sewell* (*i*), in which the defendant, having been requested by A. to recommend a person to value some work done for him by the plaintiff's master under contract, told A. that the plaintiff had stolen some of the materials, and afterwards repeated the charge to the plaintiff's master; but it was held that the defendant was not liable to an action without proof of express malice on his part; for although the charge appeared to be untrue, yet the communication having been made *bonâ fide to a person interested* in discovering a wrongdoer, and *who made inquiries*, and believed to be true by the defendant, was privileged.

Kine v. *Sewell.*

Complaints

Where a person having ground or supposed ground of com-

(*f*) *M'Dougal* v. *Claridge*, 1 Camp. 267; see *Wright* v. *Woodgate*, 2 Cr. M. & R. 573; *Shipley* v. *Todhunter*, 7 C. & P. 680. In the latter case Tindal, C. J., in summing up to the jury said, "There can be no doubt that a man has a right to communicate to any other any information he is possessed of in a matter in which they have a mutual interest."

(*g*) *Wilson* v. *Robinson*, 7 Q. B. 68.

(*h*) *Martin* v. *Strong*, 5 A. & E. 535.

(*i*) 3 M. & W. 303; see *Kershaw* v. *Bailey*, 1 Exc. 743.

made to master with a view to redress.

plaint against a servant or public officer, makes a representation of his conduct to his master or superior officer with a *view to obtaining redress*, the communication has been held to be privileged on the ground of interest in the party making it, if *bonâ fide* and honestly made, although the person addressed has not in reality the supposed power.

Lake v. *King*.

In *Lake* v. *King* (*k*) a petition presented to a committee of the House of Commons, containing criminatory matter, was held privileged, the committee having power to inquire, although

Fairman v. *Ives*.

no power to give redress to the petitioner. So where a person (*l*), having a just claim against an officer in the army, and who therefore in some measure is subject to the control of the Secretary at War, applied by petition to the latter, in order to obtain through his interference the payment of his debt; it was held that the petition having been published for the purpose of obtaining redress and not for the purpose of slander, could not

R. v. *Bayley*.

be made the subject of an action. And Best, J., cited *The King* v. *Bayley* (*m*), in which a letter addressed to General Willes and the four principal officers of the Guards, to be by them presented to the king, stating that the prosecutor had obtained from the defendant a warrant for the payment of money due to him from government, under a promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant, was held to be no libel, but a representation of an injury drawn up in a proper way for redress, and added: "That case is like the present. Neither the officers nor the king could give the defendant direct assistance in receiving the money wrongfully withheld. But the king had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honour and justice required. In the present case there was at least probable cause for thinking that the Secretary at War would advise his Majesty that the plaintiff was not worthy to remain in the army unless he did the defendant immediate justice."

Blake v. *Pinfold*.

So in an action (*n*) for libel upon the plaintiff, in his situation of guard of the Exeter mail, by reason of which he was dismissed from his situation. The libel complained of was a letter written to Sir Francis Freeling, chief secretary to her Majesty's postmaster-general, by the defendant, who was unconnected with the post-office, complaining of some misconduct of the plaintiff towards the defendant's wife in a journey by the mail. It was held by Taunton, J., that the letter was clearly *not* privileged, on the ground of its being an *official* communication (*o*). But that learned judge also expressed an opinion, that the occasion on which the letter was published, rendered its publication excusable, in the absence of express malice. And in another similar case (*p*), Alderson, B., laid down similar law.

(*k*) 1 Wms. Saund. 131 *b*.

(*l*) *Fairman* v. *Ives*, 5 B. & Ald. 642; and see *Wenman* v. *Ash*, 13 C. B. 837.

(*m*) Bac. Abr. Libel, A. 2.

(*n*) *Blake* v. *Pinfold*, 1 Mood. & Rob. 198.

(*o*) Within the cases of *Horne* v. *Bentinck*, 2 B. & B. 130; *Wyatt* v. *Gore*, Holt, 299.

(*p*) *Woodward* v. *Lander*, 6 C. & P. 548.

Upon similar principles, a letter written by a discharged butcher to his customer, reflecting on the honesty of the customer's housekeeper, was held a privileged communication (*p*).

Letter by tradesman to customer reflecting on character of customer's servant. *Harrison* v. *Bush.*

And a memorial, transmitted to the Home Secretary, complaining of the conduct of the plaintiff, who was a county magistrate, during an election of an M.P. for a borough in the county, has been held to be privileged, although in practice the advice of the Keeper of the Great Seal is generally acted upon as to the removal of justices; as the memorial might be considered as addressed to the Queen through the Home Secretary, who might himself have caused an inquiry to be made, have communicated with the Keeper of the Great Seal, and have in effect recommended the removal of the plaintiff (*q*).

Memorial to Home Secretary complaining of a magistrate.

Upon similar principles a letter from a servant to his master, reflecting upon the character of a third person, who had either complained, or threatened to complain, to the master about the servant, would be privileged (*r*).

Letter from servant to his master about third person.

Where a communication is privileged, the mere fact that a third person was present at the time it was made, will not render it less so, though, if an opportunity of publishing the libel in the presence of a third person is sought out, that may be evidence of malice. Thus, were (*s*) it appeared that the plaintiff was a journeyman carpenter, and had been in the employ of B., a master carpenter, in the constant employ of the Earl of Devon at Powderham. The defendant was tenant to the Earl, and required some repairs at his farm, and plaintiff, pursuant to B.'s orders, went with another workman to the defendant's house for the purpose of doing them. The work was done in a negligent manner, and not to the satisfaction of B. During the progress of the work the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar and obtained access to his cyder. B. had requested the defendant to inspect the work; and afterwards, whilst the plaintiff and one T. were at work at Powderham, the defendant came up, and *in his presence*, charged the plaintiff with breaking open the cellar, getting drunk, and spoiling his job. The plaintiff denied the charge, but defendant said he would swear it, and so would his men. In a subsequent conversation, *in the plaintiff's absence*, the defendant, in answer to a question by T., whether he really thought the plaintiff had broken open his cellar, said he was sure of it, and his people would swear to it. Defendant then went away in search of B., whom he saw, and to whom he repeated that the plaintiff had broken open the door, got drunk, and spoiled his job. B. thereupon went to the plaintiff, and told him that until his character was cleared he could not remain in the employ of the

Presence of third person will not take away privilege, though seeking a witness may be evidence of malice. *Toogood* v. *Spyring.*

(*p*) *Coward* v. *Wellington*, 7 C. & P. 531.

(*q*) *Harrison* v. *Bush*, 5 E. & B. 344, overruling, to a certain extent, *Blagg* v. *Sturt*, 10 Q. B. 899, in which case, however, there was express malice.

(*r*) See *Wright* v. *Woodgate*, 2 Cr. M. & R. 573.

(*s*) *Toogood* v. *Spyring*, 1 Cr. M. & R. 181; and see *Padmore* v. *Lawrence*, 11 A. & E. 380; *Taylor* v. *Hawkins*, 20 L. J., N. S., Q. B. 313, *ante*, p. 263.

Toogood v. *Spyring.*

Earl. The next day B. investigated the charge, and told the plaintiff he considered it not made out, and his character was cleared, and he might go to work again, but the plaintiff refused to work, saying his character was not cleared, and brought his action against the defendant. It was held, that the communication to B. was privileged, and that the statement made to T. upon the second meeting in the plaintiff's absence was not, but that the statement made *to* the plaintiff, though in the presence of T., was privileged. And in delivering the judgment of the Court of Exchequer, Lord Wensleydale, after laying down the principles which have been already cited (*t*), said, "Among the many cases which have been reported on this subject, one precisely in point has not I believe occurred; but one of the most ordinary and common instances in which the principle has been applied in practice, is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed) (*u*), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if on every occasion in which they were made, they were not protected unless strictly private. In this class of communication is no doubt comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of *necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives. In the present case the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly for any supposed misconduct in the course of his employment, and we think that the fact, that the imputation was made in T.'s presence, does not *of itself* render the communication unwarranted and officious, but at most is a

(*t*) *Ante*, p. 260.
(*u*) *Child* v. *Affleck*, 9 B. & C. 403. See this case, *ante*, p. 258.

circumstance to be left to the consideration of the jury. We agree with the learned judge, that the statement to T. in the plaintiff's absence was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false."

Rules, where communication not privileged.

Where communications made with reference to the character of servants do not come within the class of privileged communications, they are, of course, subject to the ordinary rules which govern actions for defamation. It is not, however, necessary here to enter into a full examination of those rules which have been already treated of in the work before referred to (*x*): it is sufficient to state, that in actions for slander, the general rule is, that where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in an office, or to a person of a profession or trade, they are in themselves actionable; in other cases the party who brings an action for words, must show the damage which he has received from them (*y*).

Imputation affecting servant in his character of servant.

From hence, it appears that an action for slander may be maintained by a servant without proof of special damage, where the imputation affects him in his situation of servant, that is, where it is made with reference to his character or conduct as such, and imputes to him the want of some qualification for or misconduct in his situation.

Seaman v. *Bigg*.

Thus, in *Seaman* v. *Bigg* (*z*), in the time of Charles I., it was held that the words, "Thou are a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a bailiff and servant in husbandry, were actionable; for, said the court, though "true it is generally an action will not lie for calling one 'cozening knave,' yet where the words are

(*x*) Starkie on Slander. Neither is it necessary to enter into a discussion of what expressions are, and what are not, actionable. It may, however, be remarked, that where the expressions used are capable of a harmless and also of an injurious meaning, the plaintiff is at liberty to point them by *innuendo* to the latter, if in their ordinary sense they are capable of such a construction. Thus, in *Clegg* v. *Laffer*, 10 Bing. 250, where the defendant, in writing to one of his friends, said of the plaintiff, "He is so inflated with 200*l.* or 300*l.* which he has made in my service—God only knows whether honestly or otherwise—that," &c., and the plaintiff in his declaration explained the words by *innuendo* thus—"Meaning to insinuate that the plaintiff had conducted himself in a dishonest manner in the defendant's service," the Court of Common Pleas held that the *innuendo* did not exceed the limits which, according to the definitions in the authorities, it is allowed to make. See further on this point, 1 Wms. Saund. 243 *a*, note (*i*); *Griffiths* v. *Lewis*, 8 Q. B. 841. But the *innuendo* must not be too large, *Day* v. *Robinson*, 1 A. & E. 554; *Wheeler* v. *Haynes*, 9 A. & E. 286; see *Williams* v. *Gardiner*, 1 M. & W. 245.

(*y*) Bac. Abr. Slander, A; 1 Stark. on Slander, 10.

(*z*) Cro. Car. 480; and see *Reignald's Case*, Cro. Car. 563, where similar words were held actionable when spoken of a deputy clerk to a register. See also *Wright* v. *Moorhouse*, Cro. Eliz. 358.

spoken of one who is a servant and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelihood and means of maintenance, there is good reason it should bear an action, that he might have recompense for loss of his credit and means."

Must be connected with character.

Lumby v. *Allday*.

But unless the imputation be connected with the servant's occupation, or show the want of some general requisite, no action can be maintained in respect of it. "Every authority which I have been able to find," said Bayley, B., in *Lumby* v. *Allday* (*a*), "either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business." In that case, therefore, where the defendant said of the plaintiff, who was clerk to the Birmingham and Staffordshire Gas Light Company, "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores. I will have you in the *Argus*. You have bought up all the copies of the *Argus*, knowing you have been exposed. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold," Bayley, B., intimated a strong opinion that the char proved was not actionable; because the imputation it contained did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk.

Manner of connection must appear in the declaration.

James v. *Brook*.

And where the plaintiff complains of the imputation of scandalous conduct in his occupation, it is necessary for him to set forth in the declaration, in what manner it was *connected with his occupation* by the defendant (*b*). And, therefore, in an action for slander of a salaried superintendent of police, at Leeds, where the declaration did not show how the slander was connected by the defendant with the plaintiff's office, judgment was arrested (*c*).

Special damage;

Where the words complained of by the plaintiff are not actionable *per se*, it becomes necessary for the plaintiff to allege and prove what is called *special damage*, *i. e.*, some actual specific injury resulting from the use of the words. And it is also necessary for the plaintiff to prove special damage where it is alleged in a declaration for words which *are* actionable *per se*.

must be legal consequence of the words spoken.

Vicars v. *Wilcocks*.

But in either of those cases, it is said not to be sufficient for the plaintiff to prove a mere wrongful act of a third person induced by the slander, but that the special damage complained of must be the legal and natural consequence of the words spoken. Therefore (*d*), in an action for slander, where the special damage alleged was, that in consequence of words used by the defendant, J. O. had discharged the plaintiff, and R. P. had refused to hire him: and it appeared that the plaintiff had been retained by J. O. as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of certain words spoken by the defendant, who

(*a*) 1 Cr. & J. 305.

(*b*) See *Ayre* v. *Craven*, 2 A. & E. 8; *Doyley* v. *Roberts*, 3 Bing. N. C. 835; *Southee* v. *Denny*, 1 Exc. 196; *Hopwood* v. *Thorn*, 8 C. B. 293.

(*c*) *James* v. *Brook*, 9 Q. B. 7.

(*d*) *Vicars* v. *Wilcocks*, 8 East, 1.

accused the plaintiff of cutting his cordage: and it also appeared that the plaintiff afterwards applied to R. P. for employment, but he refused to employ him in consequence of the words, and *because his former master had discharged him for the offence imputed to him:* it was held that the action could not be maintained, as the special damage alleged was not the legal and natural consequence of the words spoken. And Lord Ellenborough added, "Here it was an illegal consequence; a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond, by way of punishment for his supposed transgression. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken as it is alleged to be, there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ, which was more likely to weigh with R. P. than the mere words themselves of the defendant."

Kelly v. *Partington.*

Upon similar principles in an action for slander by a shopwoman and servant for saying of her, "She secreted 1*s.* 6*d.* under the till, stating, these are not times to be robbed" (*e*): in consequence of which it was alleged one S. refused to engage her in his service, judgment was arrested on the ground that the special damage alleged was not the natural result of the words used; and Patteson, J., observed: "It is said that the words are actionable because a person after hearing them chose in his caprice to reject the plaintiff as a servant. But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory."

Not approved of.

But these cases have not been altogether approved of (*f*); and in a subsequent case it was held that the discharge of the plaintiff by her employer, in consequence of words used by the defendant was not too remote an injury to entitle the plaintiff to recover damages in respect of it; the court distinguishing that case from *Vicars* v. *Wilcocks.* The case alluded to is *Knight* v. *Gibbs* (*g*), in which it appeared that the plaintiff and another young woman lodged in the house of E., whose wife was a straw-bonnet maker, and employed them in the way of her business. The defendant, who was landlord of the house, and lived next door but one, came to Mrs. E., and spoke of the plaintiff and her fellow-lodger thus: "I am ashamed of their conduct; they were singing and making a noise, and tabouring

Knight v. *Gibbs.*

(*e*) *Kelly* v. *Partington*, 5 B. & Ad. 645; and see *Ashley* v. *Harrison*, 1 Esp. 48; *Taylor* v. *Neri*, 1 Esp. 386, *ante*, p. 86.

(*f*) See 1 Starkie on Slander, 206, note *x*. That learned author considers *Vicars* v. *Wilcocks* inconsistent with the cases in which the special damage has consisted of loss of marriage, where the party, who by reason of the slander broke off the marriage, was under a promise to marry. And see *Morris* v. *Langdale*, 2 B. & P. 284; *Green* v. *Button*, 2 Cr. M. & R. 707; and the note to *Vicars* v. *Wilcocks*, 2 Smith's L. C. 300.

(*g*) 1 A. & E. 43.

Knight v. *Gibbs.*

the windows (*i. e.*, tapping them with their fingers); it is no use their denying it; their conduct is shameful and disgraceful, more like a bawdy-house than anything else, and no moral person would like to have such people in his house." After this Mrs. E. dismissed them, which was the special damage complained of. She gave the following evidence as to her motives:—"I dismissed them because I thought it would offend the defendant to keep her longer; it was in consequence of what he had said. It was not because I believed the words, but because I was afraid that it would offend the defendant to keep her; he was my landlord, and came to complain of the conduct of my lodgers." The plaintiff recovered a verdict, with which the court refused to interfere, Parke, J., observing: "It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated, although no slanderous words had been used. But it is clear that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient for this action to show that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used, but different words were not used, and she was sent away in consequence of these. In *Vicars* v. *Wilcocks*, supposing the point there to have been rightly decided, there were two distinct causes of the special damage—the words used and an act done by a third person; and the damage might have resulted from either." And Patteson, J., added: "The case is not like *Vicars* v. *Wilcocks*, because here the whole cause of the special damage proceeds from the defendant himself; nothing is done by any other person."

Action for endorsing cab-driver's licence.

Hurrell v. *Ellis.*

Before quitting this part of our subject it may be noticed that it has been held (*h*) that an action lies by a cab-driver against his master for wrongfully and unjustly defacing his licence as a driver under the statute 6 & 7 Vict. c. 86 (*i*) (which by sect. 21 of that statute the proprietor of every hackney carriage is required to retain in his possession whilst the driver remains in his service), and which licence the defendant had defaced by writing upon it a bad character of the plaintiff as a driver. And it was held, after verdict, to be not necessary to aver that it was maliciously done. But in a previous case (*k*) Lord Abinger had stated his opinion that if a servant enter into a service and bring a written character with him, his master could not be considered to do wrong if he wrote upon it that the person to whose character it related had afterwards been in his service and was dismissed for ill-behaviour.

Action will not lie for endorsing servant's written character.

Taylor v. *Rowan.*

(*h*) *Hurrell* v. *Ellis*, 2 C. B. 295; acc. *Rogers* v. *Macnamara*, 14 C. B. 27, where it was held to be no justification that the matter, indorsed on the licence, was *true*.

(*i*) For regulating hackney and stage carriages in and near London.

(*k*) *Taylor* v. *Rowan*, 7 C. & P. 70; *S. C.* 1 Mood. & Rob. 490.

FALSE AND FORGED CHARACTERS—Stat. 32 Geo. 3, c. 56.

If a master knowingly give a false character of a servant *to a person about to hire* him, and the servant afterwards rob or injure his new master, *he* may, in an action for the deceit, recover from the former master the damages he has sustained in consequence of such false character having been given (*l*). Liability of master to person to whom false character of servant given.

Moreover in such cases a criminal responsibility is sometimes incurred by a person giving a false character (*m*).

By the statute 32 Geo. 3, c. 56, after reciting that "whereas many false and counterfeit characters of servants have either been given personally or in writing by evil-disposed persons being or pretending to be the master, mistress, retainer or superintendent of such servants, or by persons who have actually retained such servants in their respective service, contrary to truth and justice and to the peace and security of his Majesty's subjects; and whereas the evil herein complained of is not only difficult to be guarded against, but is also of great magnitude and continually increasing, and no sufficient remedy has hitherto been applied:" it is enacted that, after 1st July, 1792:— 32 Geo. 3, c. 56.

"If any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent or servant of any such master or mistress, and shall either personally or in writing give any false, forged or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons, then and in such case every such person or persons so offending shall forfeit and undergo the penalty or punishment thereinafter mentioned." Sect. 1. Any person personating master or giving false character;

(*l*) *Wilkin* v. *Read*, 15 C. B. 192. See *Pasley* v. *Freeman*, 3 T. R. 51; *S. C.* 2 Smith's L. C. 56, in a note to which will be found a discussion of the interesting question, how far legal, without moral, fraud furnishes a ground of action. It is conceived that Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 6, which provides "that no action shall be brought whereby to charge any person upon, or by reason of any representation or assurance made or given, concerning or relating to *the character, conduct*, credit, ability, trade or dealings of any other *person to the intent* or purpose that such other person may obtain *credit*, monies or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith"—would not apply to characters given to servants to enable them to obtain situations, as that act was passed to remedy an evil which had grown up of evading the Statute of Frauds (which required guarantees to be in writing), by suing parties for false representation as to characters of third persons whereby *goods* had been obtained, and thus indirectly fixing them with the debts of such third persons, see *Lyde* v. *Barnard*, 1 M. & W. 101; *Tatton* v. *Wade*, 18 C. B. 371.

(*m*) Knowingly uttering a forged testimonial to character with intent to deceive, and thereby obtain a situation of emolument, is a forgery at common law, *R.* v. *Sharman*, 23 L. J., M. C. 51; *R.* v. *Moah*, 27 L. J., M. C. 204; *S. C.* 1 Dears. & Bell C. C. 550; 4 Jur., N. S. 464.

Sect. 2. or asserting that a servant has been hired for a period of time, or in a station;

"If any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever other than that for which or in which he, she or they shall have hired or retained such servant in his, her or their service or employment, or for the service of any other person or persons, that then, and in either of the said cases such person or persons so offending as aforesaid shall forfeit and undergo the penalty or punishment thereinafter mentioned."

Sect. 3. or was discharged at any other time, or had not been hired in any previous service, contrary to the fact;

"If any person or persons shall knowingly and wilfully pretend, or falsely assert in writing, that any servant was discharged, or left his, her or their service at any other time than that at which he or she was discharged, or actually left such service; or that any such servant had not been hired or employed in any previous service contrary to truth, that then, and in either of the said cases, such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned."

Sect. 4. or any person offering himself as a servant pretending to have served where he has not served, or with a false certificate, or altering any certificate;

"If any person shall offer himself or herself as a servant, asserting or pretending that he or she hath served in any service in which such servant shall not actually have served; or with a false, forged or counterfeit certificate, of his or her character; or shall in anywise add to or alter, efface or erase any word, date, matter or thing contained in or referred to, in any certificate given to him or her by his or her last or former master or mistress, or by any other person or persons duly authorized by such master or mistress to give the same, that then, and in either of the said cases, such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned."

Sect. 5. or who having been before in service shall pretend not to have been in such service;

"If any person or persons having before been in service shall, when offering to hire himself, herself or themselves as a servant or servants in any service whatsoever, falsely and wilfully pretend not to have been hired or retained in any previous service as a servant, that then, and in such case, such person or persons shall forfeit and undergo the penalty or punishment thereinafter mentioned.

Sect. 6. shall, on conviction, forfeit 20*l.*

"If any person or persons shall be convicted of any or either of the offence or offences aforesaid by his, her or their confession, or by the oath of one or more credible witness or witnesses before two or more justices of the peace for the county, riding, division, city, liberty, town or place where the offence or offences shall have been committed (which oath such justices are hereby empowered and required to administer), every such offender or offenders shall forfeit the sum of twenty pounds, one moiety whereof shall be paid to the person or persons on whose information the party or parties offending shall have been convicted, and the other moiety thereof shall go and be applied for the use of the poor of the parish wherein the offence shall have been committed; and if the party who shall have been so convicted shall not immediately pay the said sum of twenty pounds so forfeited, together with the sum of ten shillings for the costs and charges attending such conviction, or shall not give notice of appeal, and enter into recognizance in the manner therein-

Application of forfeiture.

Persons not paying the penalty with costs, or not giving notice of appeal,

after mentioned and in that behalf provided, such justices shall and may commit every such offender to the house of correction, or some other prison of the county, riding, division, city, liberty, town or place in which he or she shall have been convicted, there to remain and be kept to hard labour, without bail or mainprize, for any time not exceeding three months, or less than one month, or until he or she pay the said sum so forfeited, together with such costs and charges as aforesaid." &c., may be committed.

And by sect. 7, after reciting that "it most frequently happens that no person is present at, or privy to, the giving of the character of a servant except the persons by and to whom the same is given, it is enacted that the informer, in any of the cases aforesaid, shall be, and shall be deemed and taken to be, a good and competent witness in law, notwithstanding he shall be entitled to a part of the said penalty, where the same shall be levied as aforesaid." Sect. 7. Informer, though entitled to part of the penalty, a competent witness.

By sect. 8 it is provided, "That if any servant or servants who shall have been guilty of any of the offences aforesaid shall, before any information has been given or lodged against him, her, or them for such offence, discover and inform against any person or persons, concerned with him, her or them in any offence against this act, so as such offender or offenders be convicted of such offence in manner aforesaid, every such servant or servants so discovering and informing shall thereupon be discharged and indemnified of, from and against all penalties and punishments to which at the time of such information given, he, she or they might be liable by this act, for, or by reason of such, his, her or their own offence or offences." Sect. 8. Offenders discovering accomplices before information, indemnified.

By sect. 9, for the more easy and speedy conviction of offenders against the act, "It is enacted that all justices of the peace before whom any person or persons shall be convicted of any offence against the act, shall and may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall happen, viz.:— Sect. 9. Form of conviction.

"Be it remembered that on the day of in the year of our Lord A. B. is convicted before us two of his Majesty's justices of the peace for the county of [*specifying the offence, and the time and place when and where the same was committed, as the case shall be.*]

"Given under our hands and seals the day and year aforesaid."

And by sect. 10 it is provided, "That if any person shall think himself or herself aggrieved by anything done in pursuance of this act, such person may appeal to the justices of the peace at the next general or quarter sessions of the peace to be held for the county or place wherein the cause of complaint shall have arisen, such appellant entering into a recognizance, with two sufficient sureties in the sum of twenty pounds each, conditioned to try such appeal, and abide the order of, and to pay such costs as shall be awarded by such justices at such general or quarter sessions, upon due proof of such notice being given as aforesaid, and of the entering into such recognizance; which Sect. 10. Parties aggrieved may appeal to the quarter sessions where the matter may be finally determined in a summary way, &c.

said justices shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against as they the said justices shall think proper, and the determination of such general or quarter sessions shall be binding and conclusive to all intents and purposes; and no conviction or order made concerning any matters aforesaid, or any other proceedings to be had touching the conviction or convictions of any offender or offenders against this act, shall be quashed for want of form, or be removed by *certiorari*, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster."

Proceedings not to be quashed for want of form, or removed by *certiorari*.

CHAPTER VIII.

OFFENCES BY SERVANTS AGAINST THEIR MASTERS.

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MURDER OF MASTER BY SERVANT.

FORMERLY, both by the common law and also by the stat. 25 Edw. 3, st. 5, c. 2, it was petit treason for a servant to kill his master or mistress (*a*). So much of the stat. 25 Edw. 3, however, as relates to petit treason, was repealed by 9 Geo. 4, c. 31 (*b*), whereby it is enacted (sect. 2) that every offence which before the 1st of July, 1828, would have amounted to petit treason, shall from that day be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried and punished as principals and accessories in murder (*c*). 9 Geo. 4, c. 31, s. 2.

Where a servant put poison into a coffee-pot, and, when her mistress came down to breakfast, said she had put the coffee-pot there for her, such servant was held indictable under 9 Geo. 4, c. 31, s. 11, for "causing poison to be taken" (*d*). *R.* v. *Harley.*

(*a*) See 3 Inst. 20; Dalt. Just. ch. 142. Lord Coke, 3 Inst. 48, mentions the case of one Margaret Davy, a young woman who was attainted of high treason for poisoning her mistress (under statute 22 Hen. 8, c. 9), and with some others was boiled to death in hot water in Smithfield. But, he adds, this statute was too severe to live long, and therefore was repealed, 1 Edw. 6, c. 12, and 1 Mary, c. 1.

(*b*) The Irish Act is 10 Geo. 4, c. 34, s. 3.

(*c*) See further on this subject, Russ. on Crimes.

(*d*) *R.* v. *Harley*, 4 C. & P. 369.

ASSAULTS COMMITTED BY SERVANTS ON THEIR MASTERS.

The 21st sect. of 5 Eliz. c. 4, which provided a special punishment for assaults committed by servants on masters, was repealed by 9 Geo. 4, c. 31, s. 1, and the offence is now punishable in the same way as assaults committed by other persons (*e*).

9 Geo. 4, c. 31.

Sect. 25. Assaults with intent to commit felony, or in pursuance of conspiracy to raise wages.

By sect. 25 of that act it is enacted, that if any person shall be charged with and convicted of any assault, with intent to commit felony, or of any assault committed in pursuance of any conspiracy to raise the rate of wages, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender and require him to find sureties for keeping the peace (*f*).

BURGLARY BY A SERVANT IN HIS MASTER'S HOUSE.

A servant who lives in his master's house may be guilty of burglary in that house, as well as a stranger, for the opportunity which his situation affords him of committing that crime aggravates rather than extenuates his guilt (*g*). Where, therefore, one of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with design to commit a rape, C. J. King ruled it to be burglary, and the defendant was convicted and transported (*h*).

Opening door, &c., with design to commit felony, *R.* v. *Gray.*

And where (*i*) a servant, in the night time, opened the street door and let in a robber, and showed him the sideboard from whence he took the plate, and then again opened the door and let him out, it was held, at a meeting of all the judges, to be burglary in the servant as well as the other, and he was afterwards executed. But where a servant opened the door and let in a robber for the purpose of catching him, having previously communicated with the police, it has been held that the robber could not be convicted of burglary (*k*).

to let in robber. *Cornwall's Case.* *R.* v. *Johnson.*

to obtain

And in *R.* v. *Mears* (*l*), a case is cited, where a journeyman

(*e*) See 9 Geo. 4, c. 31, ss. 27, 28, 29; the Irish Act is 10 Geo. 4, c. 34, s. 28. As to the costs and expenses of indictment under sect. 29, see 14 & 15 Vict. c. 55, s. 3. Justices, however, have no jurisdiction under 9 Geo. 4, c. 31, s. 27, to convict of an assault, except upon the complaint of the party aggrieved, *R.* v. *Deny*, 2 L. M. & P. 230.

(*f*) Justices have a discretion as to admitting to bail persons charged with assault in pursuance of conspiracy to raise wages, 11 & 12 Vict. c. 42, s. 23. See *Linford* v. *Fitzroy*, 13 Q. B. 240.

(*g*) See 4 Bl. Com. 227; Bac. Abr. tit. Burglary. As to burglary in general, see 1 Russ. on Crimes, B. 4, ch. 1.

(*h*) *R.* v. *Gray*, 1 Str. 481.

(*i*) *Cornwall's Case*, 2 Str. 881; and see 19 St. Tr. 782, note; 1 Hale, P. C. 553; 2 East, P. C. 486.

(*k*) *R.* v. *Johnson*, Carr. & M. 218; see *R.* v. *Eggington*, 2 B. & P. 508.

(*l*) 1 Show. 53; 3 B. & P. 108.

who had embezzled money received for his master, and left in his chamber in his master's house, and being discharged, entered the house in the night and took the money from the chamber, it was held to be no burglary, because the taking the money did not amount to felony, that is, to larceny, the money not having been taken out of the possession of the master.

money previously embezzled.

In the case of a servant opening a door of his master's house for a felonious purpose, without any plan or conspiracy with other persons to commit a robbery, it seems to have been considered that the question, whether such act will amount to a breaking, must depend upon the point whether the door might have been opened by the servant in the course of his trust and employment. Thus, it is said, that if a servant unlatch a door or turn a key in a door of his master's house, and steal property out of the room, such opening of the door, being within his trust, is not a breaking: but that if a servant break open a door, whether outward or inward (as a closet, study or counting-house), and steal goods, such opening, not being within his trust, will amount to a breaking of the house, either within the statutes relating to the breaking of dwelling-houses in the daytime or within the law of burglary (*m*).

Distinction between cases where opening door is within servant's trust, and where not.

SERVANTS NEGLIGENTLY SETTING FIRE TO THEIR MASTER'S HOUSE, &c.

By stat. 14 Geo. 3, c. 78, s. 84, after reciting that fires often happen by the negligence (*n*) and carelessness of servants, it is enacted, "That if any menial or other servant or servants, through negligence or carelessness, shall fire or caused to be fired any dwelling-house or outhouse or houses or other buildings, whether within the limits of that act or elsewhere within the kingdom of Great Britain, such servant or servants being thereof lawfully convicted by the oath of one or more credible witness or witnesses, made before two or more of his Majesty's justices of the peace, shall forfeit and pay the sum of 100*l.* unto the churchwardens or overseers of such parish where such fire shall happen, to be distributed amongst the sufferers by such fire, in such proportions as to the said churchwardens shall seem just; and in case of default or refusal to pay the same immediately after such conviction, the same being lawfully demanded by the said churchwardens, that then and in such case such servant or servants shall, by warrant under the hands and seals of two or more of his Majesty's justices of the peace, be committed to the common gaol or house of correction,

14 Geo. 3, c. 78, s. 84.

Servants by carelessness firing a house to forfeit 100*l.*, or be imprisoned eighteen months.

(*m*) 1 Russ. on Crimes, 794, citing 2 Hale, 354, 355; but the learned editor of the 3rd edit. (Greaves) adds, "*sed quære*, and see *Edmond's Case*, Hutt. 20; Kel. 67; 1 Hale, 554, where a servant, who unlatched the stair-foot door and went with a hatchet to kill his master, was held guilty of burglary."

(*n*) *Wilfully* setting fire to a dwelling-house, any person being therein, is a capital offence, 7 Will. 4 & 1 Vict. c. 89, s. 2.

as the said justices think fit, for the space of eighteen months, there to be kept to hard labour" (*o*).

SERVANT OR OTHER PERSON STEALING IN A DWELLING-HOUSE TO THE VALUE OF £5 OR MORE.

7 & 8 Geo. 4, c. 29, s. 12.

It is enacted by 7 & 8 Geo. 4, c. 29, s. 12, "that if any person shall steal in any dwelling-house any chattel, money or valuable security to the value in the whole of five pounds or more, every such offender being convicted thereof shall suffer death as a felon."

Punishment.

So much of that section, however, as inflicts the punishment of death has long been repealed (*p*), and the punishment now provided for the offence is penal servitude for not less than three years, or imprisonment for any period not exceeding two years, with or without hard labour.

It is not thought necessary to encumber this work with all the decisions on the stat. 7 & 8 Geo. 4 (*q*), which does not apply exclusively to servants; though it obviously applies to them as well as other persons. The following decisions, however, having taken place on indictments under this act against servants, could not well be omitted here consistently with the object of this work.

R. v. *Jones.*

In a case (*r*) which happened soon after the passing of the act, a shopman was charged with stealing in a dwelling-house sixty-eight yards of lace, the property of his master. The prisoner had sent the lace (which was in several distinct pieces) from Abingdon to London in a parcel by the coach, and no one piece of lace was worth 5*l.*; whereupon his counsel suggested

(*o*) This "clause raising the same sum, whatever the extent of suffering and the number of the sufferers, and inflicting the same penalty to whatever degree the negligence may have been culpable, without any power to lower the fine or shorten the imprisonment, can scarcely be supposed to have undergone much consideration on the part of the Legislature." *Per* Lord Denman in *Filliter* v. *Phippard*, 11 Q. B. 354. The enactment in the text is a *general* law, *Richards* v. *Easto*, 15 M. & W. 251; *S. C.* 3 D. & L. 515; and see *Filliter* v. *Phippard*, *ubi supra*. It is not repealed by the 7 & 8 Vict. c. 84 (which repeals some part of 14 Geo. 3, c. 78). See Schedule A. to that act.

(*p*) It was first repealed by 2 & 3 Will. 4, c. 62, which substituted transportation for life. And the 4 Will. 4, c. 44, s. 3, added hard labour and previous imprisonment. Both those acts, however, were repealed by 7 Will. 4 & 1 Vict. c. 90, which substituted transportation for not exceeding fifteen nor less than ten years, or imprisonment not exceeding three years, with or without hard labour and solitary confinement. By 9 & 10 Vict. c. 24, the punishment was altered to transportation for not less than seven years, or imprisonment for any period not exceeding two years, with or without hard labour; and by 20 & 21 Vict. c. 3, penal servitude for not less than three years was substituted for transportation.

(*q*) See them collected in 1 Russ. on Crimes, bk. 4, ch. 5.

(*r*) *R.* v. *Jones*, 4 C. & P. 217.

that *in favorem vitæ* it might be taken that the pieces of lace might have been stolen at different times; but Bolland, B., said: "I cannot assume that to have been so. We find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once, and unless you can give some evidence to show that it was stolen at different times you do not raise your point; but even if you did I should think it would be of no avail, for on the last Winter Circuit it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shown that he stole the articles one or two at a time, and under value, but that he carried them out of his master's house altogether, the articles amounting in all to more than 5*l.* value; and Mr. Baron Garrow, after much consideration, held that as the articles were all brought out of the prosecutor's house together, it was a capital offence." The prisoner was found guilty.

Where (*s*) an under-butler was indicted for stealing his master's plate to the value of 18*l.* 5*s.*, in his dwelling-house, and found guilty, but the jury recommended him to mercy on the ground that they believed that he intended to replace the property, which it appeared he had pledged, a finding which the prisoner's counsel contended amounted to a verdict of not guilty; Gurney, B., without expressing any opinion on the point, directed that the prisoner should be tried on another indictment which had been found against him for stealing a silver saucepan belonging to his master. This also the prisoner had pledged; and his counsel contended that he meant to replace this also. But in summing up, Gurney, B., said: "If this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined." The jury found the prisoner guilty, and he was transported for fourteen years. *R.* v. *Phetheon.*

(*s*) *R.* v. *Phetheon*, 9 C. & P. 552. And see *R.* v. *Wright*, 9 C. & P. 554, note, where on a servant, who was indicted for stealing his master's plate, setting up as a defence his intention to replace it, Hullock, B. (Holroyd, J., being present) left it to the jury to say whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time and then return it, for that in the latter case it was no larceny. To which the learned reporters add the following note, "This decision has given rise to much discussion in various cases; and much difficulty has been found in applying the doctrine it lays down to the facts of particular transactions. In some instances, where it has appeared clearly that the party only intended to raise money on the property for a temporary purpose, and, *at the time of pledging* the article, had a reasonable and fair expectation of being able shortly by the receipt of money to take it out of pawn, juries, under the advice of the judge, have acted upon the doctrine and acquitted. But, in other instances, where they could not discover any reasonable prospect which the party had at the time of pledging of being able soon to redeem the article, they have considered the doctrine as inapplicable and have convicted." See also *R.* v. *Holloway*, 2 C. & K. 944, *post*, p. 291; *R.* v. *Trebilcock*, 1 Dears. & B. C. C. 453.

STEALING IN A SHOP, WAREHOUSE OR COUNTING-HOUSE.

7 & 8 Geo. 4, c. 29, s. 15.

The stat. 7 & 8 Geo. 4, c. 29, also enacts, sect. 15,—"That if any person shall break and enter any shop, warehouse or counting-house, and steal therein any chattel, money or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as hereinbefore last mentioned.

Punishment.

The punishment of this offence is the same as for the offence lastly considered (*t*).

What is a shop.

Upon this enactment it was held by Alderson, B. (*u*), that to come within it "the place must be more than a mere workshop, it must be a shop for the sale of articles. A workshop such as a carpenter's shop or a blacksmith's shop would not be within the act." Lord Denman, C. J., however, in a subsequent case (*x*), refused to be guided by the opinion of Alderson, B., and held that a blacksmith's shop was within the act. And in another case (*y*), a machine-house where a weighing-machine was kept, at which all goods sent out were weighed and a book kept in which were entered all goods weighed and sent in, and in which house the account of the time of the men was taken and their wages paid (although the books were brought there for the purpose, being usually kept elsewhere) was held to be a counting-house.

What is a counting-house.

R. v. *Potter.*

LARCENY AND EMBEZZLEMENT BY CLERKS AND SERVANTS.

Distinction between larceny and embezzlement.

The legal distinction between these two offences is that the former consists in the felonious taking of property, &c., *out of the possession* of the master (*z*), whether that possession be actual or constructive, whilst the latter consists in the receiving property, &c., for or on account of the master, and fraudulently appropriating it, *before it reaches his possession*, either actual or constructive. Morally and substantially, however, the offence is the same in both cases, and accordingly the punishment for both offences is now the same. But although, since

(*t*) *Supra*, p. 282.

(*u*) In *R.* v. *Saunders*, 9 C. & P. 79.

(*x*) *R.* v. *Carter*, 1 C. & K. 173.

(*y*) *R.* v. *Potter*, 2 Den. C. C. 235.

(*z*) In *R.* v. *Holloway*, 1 Den. C. C. 370; *S. C.* 2 Carr. & K. 946. Lord Wensleydale said, "The definitions of larceny are none of them complete: East's is the most so, but that wants some explanation. His definition is 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his (the taker's) own use and make them his own property, without the consent of the owner.' This is defective for not stating what the fraudulent taking is, and what the felonious intent is; this may be explained, that the 'taking' is without any colour of right, and the 'intent' an intent to deprive the owner permanently of the property. Cases also show that a taking of goods with an intent to return them is not larceny." See also *supra*, p. 283, note (*s*).

Lord Campbell's Act for the Improvement of the Administration of Criminal Justice (*a*) a person indicted for one of those offences may be found guilty of the other, yet there is still a great practical difference between the two, for even now should a person be indicted for and *convicted of* either of those offences, upon evidence which proves the other, the conviction may be quashed and the prisoner escape (*b*).

Most of the technicalities, therefore, which formerly surrounded these offences, and which it was hoped would be done away with by Lord Campbell's Act, still survive. It therefore becomes absolutely necessary to advert to the numerous cases which have been and still continue to be decided upon the distinction above pointed out.

Larceny by servant at common law.

At common law a servant might be guilty of felony in feloniously taking away the goods of his master, though they were goods under his charge, as a shepherd, butler, &c., and may at this day, for any such offence, be indicted as for a felony at common law; but at common law, if a man had *delivered* goods to his servant to keep or carry for him, and he carried them away *animo furandi*, it was doubtful whether such servant was guilty of felony, or merely of a breach of trust. These doubts gave rise to, and are recited in the stat. 21 Hen. 8, c. 7, whereby such an offence was made felony (*c*). Subsequent decisions, however, established that where a party had only the bare charge or custody of the goods, or money of another, the legal possession remained in the owner, and the party might be guilty of trespass and larceny in fraudulently converting them to his own use (*d*). This rule holds universally in the case of servants whose possession of their master's goods *by delivery of their master* is held to be the possession of the master himself, where the master only intended to part with the *custody* of the goods, and if the servant converts such goods to his own use it is larceny, whether he had a felonious intent at the time he received them, or con-

Stat. 21 Hen. 8, c. 7.

Where servant had bare custody.

(*a*) 14 & 15 Vict. c. 100, s. 13, *post*.

(*b*) *R.* v. *Gorbutt*, 26 L. J., M. C. 47; *S. C.* 1 Dears. & Bell C. C. 166.

(*c*) It is said by Gould, J., in *R.* v. *Wilkins*, 1 Leach, C. C. 520, that this statute did not mean to weaken, but assist, the common law. But it is remarkable that the stat. 5 Eliz. c. 10 (which revived and made perpetual the stat. 21 Hen. 8), recites that it had been repealed by the general words of stat. 1 Mary, sess. 1, c. 1. That statute of Mary, however, only enacted that all offences made felony during the reign of Hen. 8, *which were not felony before*, should be repealed. Hence it would seem that at the time 5 Eliz. c. 10 was passed, it was considered that servants embezzling goods entrusted to them were not guilty of felony at common law, but only by the statute of Hen. 8. The point, however, is more curious than important, at the present day. The stat. 5 Eliz. was repealed, 7 & 8 Geo. 4, c. 27.

(*d*) Bac. Abr. Master and Servant, M. 2; Hale's Hist. P. C. 505; 2 East, P. C. c. 16, s. 14, p. 564; 2 Russ. on Crimes, ch. 16, p. 153, 3rd edition, where several cases will be found in support of the rule stated in the text.

ceived such an intention afterwards (*e*). Thus, in the case of a butler, or other servant, to whose care a master entrusts his plate or other goods, it has uniformly been held that such servants are guilty of felony by embezzling such plate or goods, or taking them fraudulently away; and this doctrine is not confined to menial servants only, for it appears, both by Hale and Hawkins, that if a shepherd who has the care of sheep, and who, from the nature of his employment, must be constantly in the pastures, takes away any part of the flock with intent to steal it, he is guilty of felony, although, in both cases, the plate is actually delivered to the butler (*f*), and the sheep to the shepherd; for the possession still remains in the master (*g*). Lord Coke says (*h*) "these things be *in onere, et non in possessione, promi, coci, pastoris*, &c." And this law prevails in all cases where servants have not the absolute dominion over the property, but are only intrusted with the care or custody of it for a particular purpose (*i*).

Paradice's Case.

Thus, a foreman and book-keeper to a mercer, not residing in his master's house, but going there every day to transact business, who received from his master certain bills to send to a correspondent by post, in the usual course of business, but, instead of sending them all, kept back one for which he obtained cash, and absconded with the money, was held rightly convicted of larceny; as the possession of the bill still remained in his master (*j*). So a carter going away with his master's cart was holden to have been guilty of felony (*k*). So where a tradesman's servant and porter was sent with a package of goods from his master's house with directions to deliver them to a customer, but by the way opened the package, sold the goods, and pocketed part of the price, all the judges held this to be felony (*l*).

Robinson's Case.

Bass's Case.

Spear's Case.

And so where a corn-factor, having purchased a cargo of oats, sent his servant with a barge to receive part of the oats in loose bulk, and the servant ordered some of the oats to be put into

(*e*) To incite a servant to steal his master's goods is a misdemeanour, indictable at the sessions, although it be not charged in the indictment that the servant stole the goods, nor that any other act was done, except the soliciting and inciting, *R.* v. *Higgins*, 2 East, 5.

(*f*) In *R.* v. *Ashley*, 1 Carr. & K. 198, it was held that plate belonging to a club could not be described as the property of the house steward in an indictment against a member of the club for stealing it.

(*g*) See *per* Gould, J., in 1 Leach, C. C. 523.

(*h*) 3 Inst. 108.

(*i*) Upon this principle it was held in *R.* v. *Wilkins*, 1 Leach, C. C. 520, that to obtain goods by false pretences from the servant of the owner to whom they were delivered for the purpose of being carried to a customer who had purchased them, was a taking from the possession of the master; and a person so taking them with a preconceived design to steal them was guilty of felony. See *R.* v. *Johnson*, 21 L. J., M. C. 32.

(*j*) *Paradice's Case*, 2 East, P. C. 565, cited by Gould, J., in 1 Leach, 523; see 2 Russ. on Crimes, 153; and see *R.* v. *Metcalfe*, Moo. C. C. 433.

(*k*) *Robinson's Case*, 2 East, P. C. 565.

(*l*) *Bass's Case*, 2 East, P. C. 566; 1 Leach, 251, 524.

sacks which he afterwards embezzled, the judges held it to be larceny (*l*).

So a servant going off with money given to him by his master to carry to another, or get changed (*m*), and, applying it to his own use, was holden guilty of larceny (*n*). *Lavender's Case.*

And so it was held to be larceny, for the confidential clerk of a merchant to take a bill of exchange unindorsed from its proper repository, discount it, and convert the proceeds to his own use; although he had the general management of his master's cash concerns, and authority to get bills discounted (*o*). *Chipchase's Case.*

And so, in the following case the prisoner was held guilty of larceny (*p*):—The prisoner W. was employed by a banking company to conduct a branch bank, and the whole of the duties thereof were discharged by him alone. He was paid 150*l.* a year, for which he was bound to provide a place for carrying on the business, and the place so provided was in his own house, where he carried on business as a wine merchant. The office was fitted up at the expense of the bank, and in it there was an iron safe provided by the bank, into which it was W.'s duty to put any money received during the day, which had not been required for the purposes of the bank. There were duplicate keys of this safe, one in W.'s custody and one under the control of the manager of the bank. W. furnished weekly accounts of monies received and paid by him, showing the balance in his hands, and of what notes, &c., the balance consisted. In September, 1855, W.'s accounts were audited, and the cash found correct, but although for two years afterwards he furnished the usual weekly accounts, no examination was made during that time of the balances in his hands. In September, 1857, the manager having appointed a time for examining the cash in W.'s hands, he said he was about 3,000*l.* short in his cash, and handed over to the manager 755*l.* 10*s.*, which he said was all the cash he had left, and which he took from a drawer in the counter, not from the safe. Afterwards, when before the magistrates on a charge of embezzling the 3,000*l.*, he said, "I admit that I have taken the amount of money which appears in my weekly return, dated September 12, 1857, and entered as a deficiency of 3,021*l.* 9*s.* 9*d.*" The jury found W. guilty of larceny as a clerk in having stolen *some money* received from customers, which, before such stealing, had been placed in the safe and made the subject of a weekly account. And it was held by the Court for the Consideration of Crown Cases Reserved, *R.* v. *Wright.* Banker's clerk taking money from iron safe.

(*l*) *Spear's Case*, 2 East, P. C. 568. In *R.* v. *Walsh*, 4 Taunt. 276, Heath, J., said, "That case went upon the ground that the corn was in the prosecutor's barges, which was the same thing as if it had been in his granary." See also *R.* v. *Reed*, Dears. C. C. 263; and see *Abrahat's Case*, 2 East, P. C. 569; *Aldridge* v. *Johnson*, 7 E. & B. 885.

(*m*) *R.* v. *Goode*, Carr. & M. 582; *R.* v. *Smith*, 1 C. & K. 423.

(*n*) *Lavender's Case*, Huntingdon Lent Ass. 1793, twice considered by the judges, East. T. 1793, and Trin. T. 1793; see 2 Russ. on Crimes, 160.

(*o*) *Chipchase's Case*, 2 Leach, 699; 2 East, P. C. c. 16, s. 15, p. 567; 2 Russ. on Crimes, 161.

(*p*) *R.* v. *Wright*, 1 Dears. & B. C. C. 431.

that there was evidence that W., as his duty required, placed in the safe money which had been previously received from customers, that he thereby determined his own exclusive possession of the money, and that by afterwards taking some of such money out of the safe, *animo furandi*, he was guilty of larceny. It was also held, that the finding, that W. stole "*some money*," was sufficiently certain, as it was not necessary that they should find that any specific amount was stolen on any particular day.

R. v. *Harding.*

And where some barilla, which the prosecutors had bought, was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, and he allowed other persons to take away the cart and dispose of the barilla for his benefit jointly with that of the other persons, it was held that *he*, as well as the other persons, was guilty of larceny at common law (*q*).

R. v. *Reed.*

Again, where (*r*) a man sent his servant with his (the master's) cart to the railway station for some coals, which were put into the cart, and on the way home the servant, without authority from his master, disposed of some of the coals to a third person, he was held to be guilty of larceny, as the coals, having been placed in the master's cart, were not in the exclusive possession of the servant, but constructively in the possession of his master.

Person employed to drive cattle who sold and pocketed the money.

And so a person employed to drive cattle to a particular place, who had no authority to sell the cattle, but did so, and converted the money to his own use, having had a felonious intent at the time he received charge of the cattle, was held guilty of larceny of the cattle.

R. v. *Stock.*

Thus, where (*s*) the prosecutor saw the prisoner at Bristol fair, and hired him to drive fifty sheep for him from Bristol to Bradford fair. This was on a Thursday, and the prisoner, with the sheep, was to meet the prosecutor on the following Sunday evening at the turnpike-gate, nearest to Bradford. The prisoner had no authority to sell the sheep, but was only to drive them to Bradford, for which he was to receive two shillings and sixpence per day. The prisoner never was a servant of the prosecutor, but had been occasionally employed to drive sheep, and he never had authority to sell. The prisoner never went to Bradford, but sold the sheep, telling the purchaser he had authority to do so. The jury found that the prisoner *at the*

(*q*) *R.* v. *Harding*, Russ. & Ry. 125. Where a master finding some brass castings in the pocket of a thief sent for a policeman, and they were taken out, but afterwards given back to the thief, who by *the master's direction* took them to the house of the person to whom he had intended to sell them, and sold them to him and gave his master the price, it was held that that person could not be convicted of receiving stolen goods, *R.* v. *Dolan*, 1 Dears. C. C. 436, overruling *R.* v. *Lyons*, Carr. & M. 217.

(*r*) *R.* v. *Reed*, 1 Dears. C. C. 168, 257. This case was twice argued, and long considered, but ultimately decided upon the authority of *Spear's Case*, *supra*, p. 286; but Lord Wensleydale said that if it were *res nova* he should have pronounced an opinion that the prisoner's offence was not larceny.

(*s*) *R.* v. *Stock*, 1 Moo. C. C. 87. But see as to drovers generally, *R.* v. *Hey*, *post*, p. 294.

time he received the sheep, *intended* to convert them to his own use, and not to go to Bradford. And he was convicted of felony, which conviction was afterwards held right by the judges.

Other cases of larceny. Servant receiving goods from master on his account.

So a servant who receives goods from his master, on the master's account, and wrongfully appropriates them, is not guilty of embezzlement, but of larceny (*t*).

In the following case (*u*), however, it was held, that, under the circumstances, a clerk ought to have been indicted for false pretences.

False pretences. *R.* v. *Essex.*

At a savings bank the course of business was this:—The depositor gave a notice to the clerk of the amount required, and if present on next night of business received a cheque from the manager; if absent, he allowed the clerk to receive and cash such cheque, and keep the cash till called for, and both depositor and clerk signed the book. The clerk, by falsely pretending to the manager that G. had given notice for 50*l.*, and was not in attendance, obtained from the manager a cheque for 50*l.*, and afterwards the cash, which he pocketed: it was held that he ought to have been indicted for false pretences, and not for larceny, as he acted as agent for the depositor.

Servant selling goods with authority and pocketing price. *R.* v. *Betts.*

If a servant who has authority to sell, and enter sale in a book, do sell, and omit to make an entry of the sale in the book, and pocket the price, he cannot be convicted of larceny of the *goods*, but of embezzlement of the money (*x*). But if a servant who has *no* authority to sell, part with his master's goods under colour of a pretended sale, to a purchaser, both servant and purchaser may be indicted for larceny (*y*).

Selling without authority. *R.* v. *Hornby.*

And if a servant take his master's property, and hand it over to another as a gift, it is as much a felony as if he sell it, or take it to a pawnbroker and pledge it. In a case, therefore, where (*z*) a cook, out of compassion, as she alleged, gave away a bundle containing bread, candles, soap and butter, done up in one of her master's towels, (altogether not worth eighteen pence,) she was convicted of larceny, and she, as well as the receiver, were sentenced to three months' imprisonment (having, under the circumstances, been recommended to mercy by the jury who tried them).

Giving away master's property. *R.* v. *White.*

(*t*) *R.* v. *Hawkins*, 1 Den. C. C. 584; *S. C.* 4 Cox, C. C. 274. It is said by the court in *R.* v. *Whittingham*, 2 Leach, C. C. 913, that "if a servant received money, either *from the master*, or from a third person on his master's account," he was guilty of *embezzlement*; but in *R.* v. *Hawkins*, Lord Truro said, "The dictum in *R.* v. *Whittingham* must be associated with some facts which do not appear in the report of the case." See also *R.* v. *Metcalf*, 1 Moo. C. C. 433, where the prisoner was held properly convicted of larceny for appropriating a cheque which he received from his master to pay to a creditor, *R.* v. *Johnson*, 21 L. J., M. C. 32; *R.* v. *Poyser*, 5 Cox, C. C. 241.

(*u*) *R.* v. *Essex*, 27 L. J., M. C. 20; *S. C.* 1 Dears. & B. 371.

(*x*) *R.* v. *Betts*, 28 L. J., M. C. 69; *S. C.* 1 Bell, C. C. 90; *R.* v. *Brackett*, 4 Cox, C. C. 274.

(*y*) *R.* v. *Hornby*, 1 C. & K. 305.

(*z*) *R.* v. *White*, 9 C. & P. 344.

Appropriating things found in master's house. *R.* v. *Kerr.*

Where a nursery-maid, who was indicted for stealing bank-notes, the property of her master, in his dwelling-house, set up as her defence, that she found them in the passage, and not knowing to whom they belonged, kept them to see if they were advertized: it was held, that she ought to have inquired of her master whether they were his or not; and that not having done so, but having taken them away from the house, she was guilty of stealing them (*a*).

Clandestinely taking master's corn, though for *his* horses.

And it has been repeatedly held (*b*) that a servant who clandestinely takes his master's corn is guilty of larceny, although he take it to give to his master's horses, and without any intention of applying it to his own private benefit.

Puddler paid by weight mixing master's metal with pig-iron. *R.* v. *Richards.*

The prisoner was employed as a puddler by an iron company. The puddlers employed were in the habit of receiving a certain quantity of pig-iron which they put into the furnaces, and they were paid for their work according to the quantity drawn out of the furnace and formed into puddle-bars. The prisoner put an iron-axle (not pig-iron) belonging to his masters into the furnace, by the melting of which, in addition to the pig-iron, his profit would be increased about 1*d*. Tindal, C. J., at first doubted whether the act of the prisoner, though unquestionably fraudulent and wrong, came within the definition of larceny, as the iron was to come back to the owners in the same substance, though in another form; but, upon the counsel for the prosecution citing *R.* v. *Morfit*, and such cases, left it to the jury to say whether the prisoner put the axle into the furnace with a

(*a*) *R.* v. *Kerr*, 8 C. & P. 176. And see *R.* v. *Thurborn*, 2 C. & K. 831; *S. C.* 1 Den. C. C. 387, where it was held that if a person finds goods that have been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, but reasonably believing that the owner can be found, it is larceny. But if he have no intention of appropriating it *at the time of finding*, the subsequent conception of such an intention would not convert the honest taking into a dishonest one, and so make him a felon by relation, *R.* v. *Preston*, 21 L. J., M. C. 41; *S. C.* 2 Den. C. C. 353; *R.* v. *Dixon*, 1 Dears. C. C. 580; *R.* v. *Christopher*, 1 Bell, C. C. 27.

(*b*) *R.* v. *Morfit*, R. & R. C. C. 307; *R.* v. *Handley*, Carr. & Marshm. 547; *R.* v. *Privett*, 2 Carr. & K. 114; *S. C.* 1 Den. C. C. 193. But see the last report of the last case, where it is said that although all the judges agreed that they were bound by previous decisions to hold it to be larceny, several of them expressed a *doubt*, if they should have so decided, if the matter were *res integra*. The following passage in Hanna's "Life of Dr. Chalmers," vol. i. p. 412, may assist the deliberations of those who still doubt on this matter. "Examining once at a farm-house, one of the ploughmen was called up. The question in order was 'What is the Eighth Commandment?' But what is stealing? 'Taking what belongs to another and using it as if it were your own.' Would it be stealing, then, in you, to take your master's oats or hay contrary to his orders, and give it to his horses? This was one of the many ways in which he (Dr. C.) sought to instil into the minds of his people a high sense of justice and truth, even in the minutest transactions of life."

felonious intent to convert it to a purpose for his own profit, for if he did so this was larceny. The jury found the prisoner guilty (*c*).

Taking more hay than master allowed. *R.* v. *Gruncell.*

And where a carter, who was allowed by his master a small quantity of hay for the use of the horses on their journey to and from London, took from his master's stables two trusses of hay above the quantity allowed, and put them on the tail of his master's waggon, and afterwards the ostler at a public-house on the road-side received them from the carter; it was held that the carter was guilty of larceny, that the larceny was complete the moment the hay got into the cart *animo furandi*, and, therefore, that the ostler was properly indicted for receiving the hay, knowing it to have been stolen; but that if it had been hay allowed for the horses which was stolen it would have been otherwise (*d*).

Offering master his own goods for sale. *R.* v. *Hall.*

In *R.* v. *Hall* (*e*), where a servant took his master's goods to his master and endeavoured to induce him to purchase them, pretending that the goods were sent by a person with whom the master dealt, it was held to be *larceny*. But in *R.* v. *Webb* (*f*), it was held (*g*) *not* to be larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages; the ore still remaining in the possession of the owners. And upon the authority of that case it was held in *R.* v. *Holloway* (*h*) not to be larceny for a workman in the employ of a tanner to take skins from his master's warehouse to the foreman at another part of the premises, pretending that he had done work on them for which he was to be paid, and intending to return the skins to his master after he had been paid

Miner fraudulently adding to heap of ore. *R.* v. *Webb.*

Tanner, skins. *R.* v. *Holloway.*

(*c*) *R.* v. *Richards*, 1 C. & K. 532.

(*d*) *R.* v. *Gruncell*, 9 C. & P. 365.

(*e*) *R.* v. *Hall*, 2 Carr. & K. 947; *S. C.* 1 Den. C. C. 381; *S. C.* 3 New Sess. Cas. 407; *R.* v. *Manning*, 22 L. J., M. C. 21.

(*f*) Moo. C. C. 431. This offence would be larceny now in the counties of Cornwall and Devon. By 2 & 3 Vict. c. 58, s. 10, "for the prosecution and punishment of frauds in mines by idle and dishonest workmen, removing or concealing ore for the purpose of obtaining more wages than are of right due to them, and thereby defrauding the adventurers in, or proprietors of, such mines, or the honest and industrious workmen therein, it is enacted, That if any person or persons employed in or about any mine within the county of Cornwall, shall take, remove or conceal the ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud the proprietor or proprietors of, or adventurer or adventurers in such mine, or any one or more of them respectively, or any workman or miner employed therein, then and in every such case respectively such person or persons so offending shall be deemed and taken to be guilty of felony; and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny." See *R.* v. *Trevenner*, 2 M. & Rob. 476. This act is extended to Devonshire by 18 & 19 Vict. c. 32, s. 28.

(*g*) Patteson, J., *dissentiente*.

(*h*) 2 Carr. & K. 944; *S. C.* 1 Den. C. C. 370; *S. C.* 3 New Sess. Cas. 410.

for his pretended work, but an attempt to commit the misdemeanour of obtaining money by false pretences. And the authority of *R.* v. *Holloway* was acted upon in the following case (*i*):—The prisoners were indicted for stealing. The master was a glove-maker, and the prisoners were in his employ as glove-finishers. When they had done any work the practice was to take the finished gloves to an upper room and lay them on a table, in order that the workmen might be paid according to the number finished. The prisoners broke open a store-room on their master's premises, took out a quantity of finished gloves and laid them on the table in the upper room, with intent fraudulently to obtain payment for them as for so many gloves finished by them. The gloves were never off the master's premises. It was held that they could not be convicted of larceny as they claimed no property or lien on the gloves, and had not sold, or attempted to sell them, as in *R.* v. *Hall* (*k*).

Glove finisher, gloves. *R.* v. *Pool.*

Where a foreman made out and rendered to his master, A., an account of 14*l.* as due from A. to his workmen, and A. gave him a cheque for the amount, all of which was due except 7*s.*, which the foreman kept when he got the cheque cashed, and paid the workmen the rest; it was held that the foreman might be convicted upon an indictment which charged that by this false pretence he obtained the cheque from A. with intent to defraud him of *the same* (*l*).

Foreman, workmen's wages—false pretences. *R.* v. *Leonard.*

But in the following case (*m*) of a somewhat similar nature, the indictment was held bad, and the prisoner escaped punishment:—A. worked for the prosecutors as a journeyman, and the quantities of work done by him for them during each week were entered in a book kept for that purpose. The prices for the work so entered were placed in a column opposite to each quantity of work, and added up on behalf of the prosecutors at the end of each week. The weekly totals of these prices were entered by them in this book, and the amount of the totals paid by them to O. as the ascertained sum due to him for work done, on the production by him of this book. After these weekly totals had been entered as above, O. altered them into larger amounts, and then procured payment of the larger amounts on producing the books, and afterwards erased the larger amounts and restored the figures of the original totals. He was indicted for obtaining money by false pretences. The indictment in some counts averred that he falsely pretended that he having executed certain work there was a certain sum of money due and owing to him for and on account of the work, being parcel of a larger sum claimed by him, whereas there was not then due and owing to him such money, being parcel of a larger sum. And in other counts it was averred that he falsely pretended that there was due and owing to him the whole amount of a sum of money for and on account of certain work executed by him, whereas there was not then due and owing to him the

Altering sums total so as to increase amount due to journeyman—not false pretences. *R.* v. *Oates.*

(*i*) *R.* v. *Pool*, 27 L. J., M. C. 53; *S. C.* 1 Dears. & B. 345.
(*k*) *Ante*, p. 291.
(*l*) *R.* v. *Leonard*, 2 C. & K. 514; *S. C.* 1 Den. C. C. 304.
(*m*) *R.* v. *Oates*, 1 Dears. C. C. 459.

whole amount of such sum of money, but only a smaller sum. It was held that the indictment was bad, as a false pretence of an existing fact was not sufficiently alleged, and the averments would be proved by evidence of a mere wrongful overcharge.

Overcharge for work done. *R.* v. *Mills.*

And again, where (*n*) a workman stated that he had done more work than he really had, and requested payment for the work he stated he had done, and his master *knowing* that it was a false overcharge, and wishing to entrap him, paid him the amount demanded, it was held that the workman could not be indicted for obtaining money under false pretences, as it was not the falsehood which induced his master to part with the money.

Silk-thrower's Case.

If a weaver or silk-throwster deliver yarn or silk to be wrought by his journeymen *in* his house, and they carry it away and convert it to their own use, this is larceny, but if to be wrought *out* of the house it is not, for the journeymen in that case are considered bailees and not servants (*o*); and they should be indicted as such under 20 & 21 Vict. c. 54, s. 4.

Clerk furnished with cash, obtaining goods on credit. *R.* v. *Goodenough.*

In a case (*p*) in which the prisoner, who was clerk to a dealer in skins, received at different times several sums of money from his master for the purpose of purchasing skins, and credited his master with the amounts in his day cash-book, but obtained the skins on credit, and debited his master in his day cash-book with several sums of money as having been paid for those skins, applying the cash to his own use; it was held that he could not be convicted of larceny of the money.

Falsifying accounts and receiving balance. *R.* v. *Green.*

And a similar decision was made in the following case (*q*):—

The prisoner was bailiff to the prosecutor, and it was part of his duty to receive and make payments on behalf of his master, and make entries of such receipts and payments in a book which was examined by the prosecutor from time to time. On one occasion the prisoner showed a balance in his favour of 2*l.*, by taking credit for payments falsely entered in his book as having been made by him, when in fact they had not been made by him, and received from his master the sum of 2*l.* as a balance due to him: it was held that the offence to which the prisoner was guilty was not larceny, whatever else it might have been.

Where master parts with possession, as well as custody, felonious intent at the time of receipt necessary to constitute larceny.

Where a master parts not only with the *custody*, but also with the *possession*, of goods to a servant, and the servant converts them to his own use, it is not *larceny* unless he had a felonious intent *at the time* he received them. And therefore in the case of drovers (*r*) and other servants entrusted with goods with authority to sell and receive the purchase-money, if such servants sell and embezzle the money, the offence will not be larceny unless the servant had a felonious intent when he took possession of the goods (*s*).

(*n*) *R.* v. *Mills*, 26 L. J., M. C. 79; *S. C.* 1 Dears. & B. 205.

(*o*) East, P. C. 682, 683; *R.* v. *Saward*, 5 Cox, C. C. 295.

(*p*) *R.* v. *Goodenough*, Dears. C. C. 210. The prisoner was indicted for embezzlement and found guilty of larceny, but the conviction was quashed.

(*q*) *R.* v. *Green*, Dears. C. C. 323.

(*r*) *R.* v. *Goodbody*, 8 C. & P. 665.

(*s*) *R.* v. *Evans*, Carr. & M. 632; and see *R.* v. *Glass*, 2 Carr. & K. 395.

R. v. *Harvey.* Therefore, where (*t*) a person sent some pigs by the prisoner to a lady to be looked at, but he sold the pigs, and did not take them to her, Alderson, B., left it to the jury to say whether the prisoner had a felonious intent from the commencement of the transaction; and whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. "If," said his lordship, "the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money, or make a bargain for the sale of them, then he will be in the situation of a bailee. The question is, whether they were delivered to the prisoner simply that he should show them to the lady, and bring them back bodily: if they were, then, if the felonious intent came upon him at that time, it would come upon him at the time when he had only the custody, and not the possession, and in that case he would be guilty of stealing them."

Drovers by trade are not servants.

R. v. *Hey.*

But it has been held (*u*), that a *drover by trade*, who was employed to drive pigs to a particular place, was paid by the day, and by the custom of the trade had a right to drive other persons cattle also, but who sold the pigs and absconded with the money, could not be convicted of larceny as a servant, as he was a mere bailee and not a servant, and had no original intention of stealing the pigs. In that case the prisoner was convicted, but the question having been reserved for the consideration of the judges, the conviction was held improper. In giving judgment in that case, Lord Wensleydale said, "The question is whether, on the facts stated in this case, the prisoner received the custody of the pigs as a servant of the prosecutor, or as a bailee; in the latter case he could not be guilty of larceny, unless he had intended to appropriate them to his own use at the time of the receipt, which was not the case; in the former he would be guilty of larceny, according to the finding of the jury; as to which they were properly directed by the learned assistant barrister. There are several reported cases bearing upon the question, whether a person is a mere servant or a bailee. There are none precisely like the present, though the case of *Rex* v. *Bernard M'Namee* (*x*), nearly approaches it. In this case on the one hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of his remuneration was by the day, tend to show that he was a mere servant; on the other, the fact of his being a drover

(*t*) *R.* v. *Harvey*, 9 C. & P. 353; and see *R.* v. *Evans*, Carr. & M. 632; but see *R.* v. *Jones*, Carr. & M. 611.

(*u*) *R.* v. *Hey*, 2 Carr. & K. 983; *S. C.* 1 Den. C. C. 602; *R.* v. *Gibbs*, 1 Dears. C. C. 445.

(*x*) 1 Moo. C. C. 368. In that case a general drover, who had been employed by the prosecutor off and on for nearly five years, but not as a regular servant, and was employed to take some sheep to G. fair, being paid 3*s.* a day, sold the sheep entrusted to him without having authority to do so, and pocketed the money, was held properly convicted of felony, as he had merely the custody of the sheep and his possession was his master's; and he had no intention of stealing sheep at the time he received them. And see *R.* v. *Jackson*, 2 Moo. C. C. 32.

by trade, and also of his having the liberty to drive the cattle of any other person by the general usage with respect to drovers, raises an inference that he was not a servant. The learned assistant barrister felt himself bound by the decision of the judges in the case of *Reg.* v. *Hughes* (*y*), but that case was under the statute 7 & 8 Geo. 4, c. 29, s. 47, which makes embezzlement by a servant, or person employed in the capacity of a servant, to receive money, felony; and the learned Recorder of London referred the question to the judges, whether the prisoner fell under either description, though if the indictment had been referred to, it was necessary to prove that he was a servant. The judges decided that the prisoner was properly convicted, and consequently that he was a servant or person employed in that capacity, and authorized as such to receive money, so that his receipt would be a discharge to the debtor. This is almost exactly the same question; it is whether the prisoner had the custody of the cattle as a servant to the prosecutor at the time of the receipt of them, and we think he could not be so considered, unless in driving the cattle to market he was his servant, and the prosecutor responsible for any negligent act of his in so driving them. This subject has undergone much discussion of late, and has been placed on its proper footing by the case of *Quarman* v. *Burnett* (*z*), and other cases; one of which is that of a general drover, who was held in the case of *Milligan* v. *Wedge* (*a*) not to be a servant, so as to make the owner of the cattle responsible for his negligence. After the full consideration which this subject has undergone, we doubt whether the case of *Rex* v. *Bernard M'Namee*, above referred to, would now be decided in the same way. Upon the whole we think it was not proved in this case that the prisoner was a mere servant, and the conviction was improper."

Where a prisoner is indebted for larceny *as a servant*, he may be convicted of simple larceny, as proof of the allegation in the indictment that he was a servant, is only necessary for the purpose of convicting him of the compound offence. If, therefore, a prisoner is indicted as servant of A., and he turn out to be the servant of B., he should be convicted of simple larceny (*b*).

Prisoner indicted for larceny as a servant may be convicted of simple larceny.

By the stat. 14 & 15 Vict. c. 100, s. 16, it is enacted, that it shall be lawful to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them.

14 & 15 Vict. c. 100.

Three larcenies in six months from same person.

And by sect. 17, that if upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof be required to

Where a single taking is charged, the prosecutor need

(*y*) 1 Moo. C. C. 370.

(*z*) 6 M. & W. 499. See this case, *ante*, p. 199.

(*a*) 12 A. & E. 737. See this case, *ante*, p. 200.

(*b*) *R.* v. *Jennings*, 1 Dears. & B. 447; *S. C.* Jurist (1858), 146.

not elect unless in certain cases.

elect upon which taking he will proceed, unless it shall appear that there were more than *three takings*, or that more than the space of six calendar months elapsed between the first and the last of such takings, and in either of such last-mentioned cases, the prosecutor shall be required to elect, to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

Coin and Bank notes may be described simply as money.

And, by sect. 18, in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note shall not be proved; and in cases of embezzlement and obtaining money or bank-notes under false pretences, by proof that the offender embezzled or obtained any piece of coin or bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Punishment of larceny by servants.

Various statutes have at different times been passed with a view to the prevention of the crime of larceny by servants, by the subjection of such persons to a heavier punishment than awaits ordinary offenders. These statutes, however, were all repealed by 7 & 8 Geo. 4, c. 27, and at the same time the law upon the subject was consolidated in the 7 & 8 Geo. 4, c. 29.

7 & 8 Geo. 4, c. 29, s. 46.

By sect. 46 of that statute, "for the punishment of depredations committed by clerks and servants in cases not punishable capitally," it is enacted that "if any clerk or servant shall steal any chattel, money or valuable security belonging to, or in the possession or power of his master, every such offender being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years (*c*), or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment (*d*).

To convict

In order to convict a person of the aggravated offence of

(*c*) This now is three years' penal servitude, or two years imprisonment, *supra*, p. 282, note (*p*).

(*d*) By sect. 4, the court may order hard labour and solitary confinement; as to the latter, see 7 Will. 4 & 1 Vict. c. 90, s. 5. It would seem that the power of the court to award the common law punishment of fine and imprisonment is not taken away, but added to, by this act of Geo. 4. See *R.* v. *Johnson*, 3 M. & S. 540. As to principals in the second degree, and accessories before and after the fact, see 7 & 8 Geo. 4, c. 29, s. 61.

larceny *as a servant* (*e*), and subject him to the increased punishment provided by this act, it is of course necessary that he should be a servant. We shall hereafter, whilst treating of embezzlement by servants, place before the reader the various decisions upon this point. But it may be here mentioned, that it has been held that the driver of a glass coach hired for the day, is not the servant of the party hiring it within the meaning of this act (*f*). And a doubt has been expressed by Coleridge, J., whether this section extends to public servants under the Crown (*g*). The case of such persons is provided for by the stat. 2 Will. 4, c. 4 (*h*).

under this Act, offender must be a servant.

Driver of glass coach not servant of hirer.

Semble, Statute does not apply to public servants.

Where, however, the money or other property had *never been in the possession* of the master, it was held that the servant was not guilty of *larceny* in misappropriating it. Thus, where (*i*) a shopman sold goods in the shop and pocketed the price, instead of putting it into the till, it was held that he could not be convicted of larceny of the money, as it had never been in his master's possession. The same law was laid down in a case where (*k*) a banker's clerk pocketed a 100*l.* note, instead of putting it into his master's drawer. These decisions gave rise to the first statute against embezzlement, 39 Geo. 3, c. 85. That statute is now repealed; and the punishment of such offences is provided for by 7 & 8 Geo. 4, c. 29, the provisions of which will be stated presently. However, since the passing of that statute, it has been held that, if the master *has had possession* of property, either by his own hands or by the hands of his clerk or servant, a servant cannot be guilty of *embezzling* it, but if he purloin it, it will be *larceny*. Thus, where (*l*) a clerk in the employ of A. received from another clerk 3*l.* of A.'s money,

Bull's Case.

Bazeley's Case.

Which gave rise to Statutes against embezzlement.

Since which it is still larceny to take property out of master's possession.

(*e*) Upon an indictment for larceny, as a servant, the prisoner may, as we have seen, be convicted of simple larceny, *supra*, p. 295. The allegation in the indictment that A. B., "being the servant," &c., stole, &c., is sufficient, *R.* v. *Somerton*, 7 B. & C. 463.

(*f*) *R.* v. *Haydon*. 7 C. & P. 445.

(*g*) *R.* v. *Lovell*, 2 Moo. & Rob. 236.

(*h*) *Post*.

(*i*) *Bull's Case*, cited 2 Leach, C. C. 841. Upon the authority of this case, it was held in *R.* v. *Headge*, Russ. & Ry. 160, that a servant, under similar circumstances, was properly indicted for embezzlement under the stat. 39 Geo. 3, c. 85. And see *Waite's Case*, 1 Leach, C. C. 28, the case of a clerk in the Bank of England purloining a bond, which gave rise to the stat. 15 Geo. 2, c. 13.

(*k*) *Bazeley's Case*, 2 Leach, C. C. 835. In *R.* v. *Rudick*, 8 C. & P. 237, a servant, sent out to collect money for his master, was robbed of it on his way home. In an indictment for the robbery the money was laid as the property of the master, and upon an objection to this being taken by counsel for the prisoners, Alderson, B., directed a fresh bill to be sent up to the grand jury, laying the money as the property of the servant; adding, "It is difficult to see how such an offence as embezzlement could have been a part of our criminal law, if the possession of the servant of property which had never come to the hands of the master were construed to be in the possession of the master."

(*l*) *R.* v. *Murray*, 1 Moo. C. C. 276; *S. C.* 5 C. & P. 145, note.

to pay for an advertisement, for which he only paid 10*s.*, but charged A. 20*s.*, pocketing the difference, all the judges held that he was not properly convicted of embezzlement under 7 & 8 Geo. 4, c. 29. s. 47.

But misappropriation of goods, *passing towards* master's possession, embezzlement.

R. v. *Masters.*

But if such property is merely in the course of passing to the master, and have *not arrived into his possession*, although in the hands of a clerk, if that clerk misappropriate it, he will be guilty of embezzlement. Thus, where (*m*) it was the duty of A.'s clerks to receive money on account of A., and pay it over to A.'s superintendent, whose duty it was to pay it over to the prisoner, whose duty it was to pay it over to A.'s cashier, these persons being all servants of A., the prisoner, having received money in this way and embezzled it, was held to be properly convicted of embezzlement under 7 & 8 Geo. 4, c. 29, s. 47.

To steal goods once completely arrived in master's possession, though merely constructively, is larceny.

R. v. *Watts.*

And if the property has *once completely arrived* into the master's possession (although merely constructively by the hands of the thief) and be there misappropriated, the offence will be larceny. Thus, in *R.* v. *Watts* (*n*), the prisoner was a clerk in the Globe Insurance Office, and it was his duty to receive from the messenger the banker's pass-book, together with the vouchers, to compare the entries in the pass-book with the entries in the books of the company, and to preserve the vouchers for the use of the company. One day the prisoner fraudulently destroyed a cheque for 1,400*l.*, which was delivered to him with the pass-book in the usual way, and altered the pass-book, having, in fact, paid the amount into his own private bankers, and he was held to have been properly convicted of *stealing* the cheque from his masters, as his possession of it was the possession of his masters. "The paper in question," said Lord Truro, "as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose he was guilty of stealing it from them, as a butler, who has the keeping of his master's plate would be guilty of larceny if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use, before it had in any other way than by his act of receiving come to the actual possession of the master."

"This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in *Reg.* v. *Masters* (*o*), where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters, made his possession theirs."

R. v. *Wright.*

A similar decision was arrived at in the following case (*p*):—

(*m*) *R.* v. *Masters*, 2 Carr. & K. 930; *S. C.* 1 Den. C. C. 332; *S. C.* 3 New Sess. Cas. 326.

(*n*) 2 Den. C. C. 14.

(*o*) *Ubi supra.*

(*p*) *R.* v. *Wright*, 27 L. J., M. C. 65; *S. C.* 1 Dears. & B. C. C. 431. In this case it was *assumed* that the money was placed in the safe, as it was the prisoner's duty to place it there.

The prisoner was employed by a banking company to manage a branch for them at B. He provided an office for the bank in his own house. The office was furnished by the company, and an iron safe provided there by them, of which there were duplicate keys, the company keeping one, and the prisoner the other. It was the duty of the prisoner to receive money from customers to place it at night in the safe, to pay away from time to time as much as was required for the business of the bank, to pay cheques, to pay over weekly any balance not required for the business at B., and to send in weekly accounts to the company. He carried on the business, receiving and paying money, and sending in weekly accounts. In auditing his accounts a deficiency of 3,000*l.* was discovered, and he admitted that he had taken that amount of money. It was held that he was properly convicted of larceny, as a clerk, in having stolen some money received from customers, which before he stole it had been placed in the safe, and made the subject of a weekly account. The court considering the case similar to the ordinary one of a shopman robbing a till.

What amounts to delivery to master. *R.* v. *Hayward.*

Where a man sent his servant to fetch home some straw which he had bought, and the servant brought it home, took it into his master's court-yard, and put it down at the stable-door which was locked; and afterwards, on the door being opened, put part of the straw into the hay-loft, but took the rest away again, and sold it, Tindal, C. J., held that the putting it down at the stable-door was a delivery of it to the master, and that the servant could not be convicted of embezzlement. He was found guilty of larceny (*q*).

Punishment of embezzlement. 7 & 8 Geo. 4, c. 29, s. 47.

By sect. 47 of the stat. 7 & 8 Geo. 4, c. 29, "for the punishment of embezzlements committed by clerks and servants, it is declared and enacted that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant (*r*), shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master (*s*), although such chattel, money or valuable security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant or other person so employed; and every such offender, being convicted thereof, shall be liable at the discretion of the court to any of the punishments which the court may award, as hereinbefore last mentioned" (*t*).

(*q*) *R.* v. *Hayward*, 1 Carr. & K. 518.

(*r*) In the stat. 39 Geo. 3, c. 85, the words "to any person or persons whomsoever, or to any body corporate or politick," are added.

(*s*) It would seem that if the words "and may be indicted and tried accordingly" had been added here, many of the difficulties attendant upon the preservation of the nice technical distinctions between larceny and embezzlement might have been avoided.

(*t*) In sect. 46, *ante*, p. 296. As to principals in the second degree, and accessories before and after the fact, see sect. 61.

What constitutes embezzlement.

In order to constitute an offence within the above section (47), three things must concur (*u*):—

1. The prisoner must be (*x*) a clerk or servant, or employed for the purpose, or in the capacity of a clerk or servant.

2. He must by virtue of such employment receive or take into his possession some chattel, money or valuable security, for or in the name or on account of his master.

3. He must fraudulently embezzle the same or some part thereof.

It will be convenient to consider these three heads separately. Many of the decisions which will be mentioned took place under the old stat. 39 Geo. 3, c. 85, but they may with propriety be inserted here.

1. The prisoner must be a clerk or servant, or employed for the purpose or in the capacity of a clerk or servant.

Apprentice.

Female servant.

Servant to corporation; though not appointed under common seal.

Accountant to overseers.

Treasurer to guardians.

It was the opinion of all the judges that an apprentice (*y*), and also a female servant (*z*), were within the stat. 39 Geo. 3, c. 85. And it is clear that a female servant is within the statute of Geo. 4 (*a*), which "there can be no doubt would also be held to embrace persons *employed* in the capacity of clerks or servants to corporations" (*b*), though not appointed under the common seal (*c*).

A person employed by the overseers of a township as their accountant and treasurer, and who received and paid all monies receivable or payable on their account, was held to be a clerk and servant within 39 Geo. 3, c. 85 (*d*). And the treasurer to the guardians of the poor of Birmingham, appointed under the stat. 1 & 2 Will. 4, c. lxvii. (local and personal) is a servant of the guardians within the meaning of the stat. 7 & 8 Geo. 4, c. 29, and as such indictable for embezzlement (*e*).

Servant employed to drive cattle for farmer;

In *R.* v. *Hughes* (*f*) it was held that a person employed by a farmer *on one occasion* as a drover in Smithfield to drive some cattle home to the purchaser and receive the price, was a ser-

(*u*) And see *per* Lord Ellenborough in *R.* v. *Johnson*, 3 M. & S. 548, 549, on the old stat. 39 Geo. 3, c. 85.

(*x*) Or have been at the time of the offence committed, *R.* v. *Lovell*, 2 M. & Rob. 236.

(*y*) *R.* v. *Mellish*, Russ. & Ry. 80.

(*z*) *R.* v. *Smith*, Russ. & Ry. 267.

(*a*) See 7 & 8 Geo. 4, c. 28, s. 14.

(*b*) *Per* Vaughan, J., in *Williams* v. *Stott*, 1 Cr. & M. 689. See the remark made upon this dictum of Vaughan, J., in Greaves' edition of Russ. on Crimes, vol. ii. p. 169, note (*g*). The learned editor, however, appears when he wrote that note to have forgotten the difference between the wording of the statute of Geo. 3, and that of Geo. 4. The interpretation put upon the word "person" by 7 & 8 Geo. 4, c. 28, s. 14, would seem hardly applicable to 7 & 8 Geo. 4, c. 29, s. 47, unless the "person" were a servant.

(*c*) *R.* v. *Beacall*, 1 C. & P. 457.

(*d*) *R.* v. *Squire*, R. & Ry. 349; *S. C.* 2 Stark 349.

(*e*) *R.* v. *Welch*, 2 Carr. & K. 296; *S. C.* 1 Den. C. C. 199. And see now 12 & 13 Vict. c. 103, s. 15, *post*, p. 302.

(*e*) *R.* v. *Hughes*, 1 Moo. C. C. 370.

vant within the meaning of the act of Geo. 4. Drovers in general, who exercise a distinct calling, would not, however, now be considered as servants under that act (*f*). not drovers in general.

It has been held that the clerk of a savings bank was properly described in an indictment for embezzlement under the statute of Geo. 4, as clerk to the trustees, although he was elected every year by ballot at a meeting of the managers (*g*). Clerk to trustees of savings banks.

And that a clerk appointed by a station committee of four several railway companies to receive the charge for the carriage of parcels by all of them, might be described as the servant of the four companies or of the committee (*h*). Clerk to joint station of several railways.

A clerk to a joint-stock banking company, established under 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company (*i*). Clerk to joint-stock bank, though shareholder.

But where W., who was a member of a friendly society, and was also clerk or secretary to the society, offered to put out their money to more advantage in London, and drew it out with the consent of the society, but appropriated it to his own use, it was held that he could not be convicted of either larceny or embezzlement, as he was *part-owner* (*k*). However, in a similar case in Ireland, where it appeared that all the property of the society was vested in *trustees*, it was held by the Court of Criminal Appeal there, that he might be described as servant to the trustees (*l*). Clerk to friendly society.

And it was held, that a person occasionally employed (*m*); a person employed upon commission to travel for orders and to collect debts, although employed by many different houses on each journey, and although he paid his own expenses out of his commission, and did not live with any of his employers, nor act in any of their counting-houses (*n*), were servants within the stat. of Geo. 3. Occasional servant. Clerk and traveller employed by many houses.

(*f*) See *R.* v. *Goodbody*, 8 C. & P. 665; *R.* v. *Hey*, 2 Carr. & K. 983; *S. C.* 1 Den. C. C. 602, *ante*, p. 294.

(*g*) *R.* v. *Jenson*, 1 Moo. C. C. 434; and see *R.* v. *Hall*, 1 Moo. C. C. 474; *R.* v. *Callaghan*, 8 C. & P. 154. As to what is sufficient evidence of acting as a trustee to support inference of legal appointment, see *R.* v. *Essex*, 1 Dears. & B. 369.

(*h*) *R.* v. *Bayley*, 26 L. J., M. C. 4; *S. C.* 1 Dears. & B. 121.

(*i*) *R.* v. *Atkinson*, Car. & M. 525; and see *R.* v. *Watts*, 2 Den. C. C. 14, *ante*, p. 298, where a clerk, who was also a shareholder in an insurance office, was convicted of embezzlement.

(*k*) *R.* v. *Waite*, 2 Cox, C. C. 245; *R.* v. *Taffs*, 4 Cox, C. C. 169.

(*l*) *R.* v. *Murphy*, 4 Cox, C. C. 101.

(*m*) *R.* v. *Spencer*, Russ. & Ry. 299; *R.* v. *Winnall*, 5 Cox C. C. 326; and see *R.* v. *Hughes*, 1 Moo. C. C. 370; *R.* v. *Metcalf*, 1 Moo. C. C. 433; but see *R.* v. *Freeman*, 5 C. & P. 534, *contra*.

(*n*) *R.* v. *Carr*, Russ. & Ry. 198; and see *R.* v. *Leach*, 3 Stark. 70. But see what is said by Lord Wensleydale in *R.* v. *Goodbody*, 8 C. & P. 667, as to a man being the servant of several persons at the same time. In *R.* v. *White*, 8 C. & P. 742, the driver of a coach, who was employed by one of the proprietors, was held to be his servant; and see *R.* v. *Batty*, 2 Moo. C. C. 257.

Person employed to carry out and sell coals, though entitled to part of profit.

So, as we have seen, a person employed to carry out coals and sell them, and who was allowed a portion of the profits for his remuneration, was held, by a majority of the judges, to be a servant within the meaning of the stat. of Geo. 3, although it was contended that he was a partner (*o*).

Servant employed to manufacture from master's materials, though entitled to part of price.

And a servant, who manufactured an article from materials the property of his master for a customer, and who, having received the price, embezzled the whole of it, was held to be within the act, although, by the agreement between him and his master, he was to have at the week's end a proportion of the price for his work (*p*)

Collector of poor-rate employed by overseers.

And it has been held (*q*), that a person employed by the overseers to collect the poor-rate was properly described as the servant of the overseers, without mentioning the churchwardens; and he having embezzled a rate collected from B., was held properly convicted under the stat. of Geo. 4.

12 & 13 Vict. c. 103, s. 15.

And now, to avoid technical difficulties which had previously arisen (*r*), it is provided by Act of Parliament (*s*), "That in respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the Poor Law Commissioners or the Poor Law Board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified."

Collectors of poor-rates and assistant overseers appointed under order of Poor Law Board servants of inhabitants of parish.

Property.

Superintendent of police.

R. v. *Baxter.*

And a superintendent of county police has been held to be properly described as the clerk and servant of the chief constable, appointed under 2 & 3 Vict. c. 93 (*t*). In that case it was the superintendent's duty to receive from the constables money received by them, and return to the chief constable a statement of such monies; and to pay the constables' wages weekly. In practice he kept accounts with the men, and set off sums received by them against their wages, the balance struck going over to next account, and so on weekly, no money passing. A constable thus accounted for 2*l.* 3*s.* 6*d.*, but the superintendent fraudulently omitted that sum in his account with the chief constable, and subsequently denied its receipt. He was, nevertheless, held to have received it *constructively*, by the mode in which the accounts were kept, and convicted of embezzlement.

(*o*) *R.* v. *Hartley*, Russ. & Ry. 139; and cases cited, *ante*, p. 39.

(*p*) *R.* v. *Huggins*, Russ. & Ry. 145.

(*q*) *R.* v. *Adey*, 1 Den. C. C. 571; *S. C.* 4 Cox, C. C. 209. And see *R.* v. *Ward*, Gow. N. P. R. 168, the case of an extra collector of poor-rates, paid by a per centage on his collection, who was held to be a servant within 39 Geo. 3, c. 85.

(*r*) *R.* v. *Townsend*, 2 C. & K. 168; *S. C.* 1 Den. C. C. 187. In *R.* v. *Truman*, 2 Cox, C. C. 306, a collector of poor-rates was held not to be a servant, but an independent officer.

(*s*) 12 & 13 Vict. c. 103, s. 15.

(*t*) *R.* v. *Baxter*, 5 Cox, C. C. 302.

But it has been held that the clerk of a chapelry, who was employed to collect the sacrament money from the communicants, was not the servant of the minister, churchwardens, or poor of the township, in which the chapel was situate (*u*). And that a schoolmaster of a charity school, no part of whose duty it was to receive subscriptions, but who, on one occasion, was requested by the treasurer to receive a sum of 15*l.* on account of the schools, did not stand in such a relation to the treasurer or the committee, as to bring him within the act (*x*).

But not person employed to collect sacrament money;

nor schoolmaster employed on one occasion by treasurer;

And a person, chosen and sworn in at a court-leet held by a corporation, as chamberlain of certain commonable lands, who received no remuneration, but whose duties were to collect money from the commoners and others using the commonable lands, to employ the money so received in keeping the lands in order, to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successor, was held not to be a servant within the meaning of the act (*y*).

nor person sworn in as chamberlain to collect money for commonable lands;

And a similar decision was made in the case of a commission agent, who was also paid a nominal salary of 1*l.* a year (*z*). The prisoner kept a refreshment house, and was employed by the prosecutors to get orders for their goods, collect the money, and pay it over. He was paid by commission. He was to go about among the farmers to get orders, but no definite time was to be spent in so doing, and he was styled their agent for the district. The prosecutors had a store at B. under the control of the prisoner, who supplied customers from the stores, pursuant to the orders he obtained. In order to obtain the security of a guarantee society for the prisoner's conduct, and in compliance with their regulations, it was arranged that the prosecutors should pay the prisoner 1*l.* a year. The prisoner having got into arrear was treated by the prosecutors as a debtor for the amount. The prisoner fraudulently appropriated money received from customers, and gave a false account. It was held that he could not be convicted of embezzlement, as he was not the servant of the prosecutors, but rather their agent.

nor a commission agent receiving a nominal salary.

R. v. *Walker.*

Again, a carrier, exclusively employed between glove sewers and the manufacturers, has been held (*a*) not to be the servant of either, but a bailee. A. and B. were two among other sewers of gloves residing at C., the manufacturers residing at D. The prisoner was a carrier residing at C., and was exclusively employed between the glove sewers at C. and the manufacturers at D. The sewers were not known to the manufacturers, but when a sewer wanted work, the prisoner gave her name and a number to the manufacturers, and received from them unsewn gloves for her to sew. Each sewer, having her number, sent

Nor a carrier who was a bailee.

R. v. *Gibbs.*

(*u*) *R.* v. *Burton*, 1 Moo. C. C. 237. It does not appear from the report who had the appointment of the clerk.

(*x*) *R.* v. *Nettleton*, 1 Moo. C. C. 259.

(*y*) *Williams* v. *Stott*, 1 Cr. & M. 675; *S. C.* 3 Tyrwh.

(*z*) *R.* v. *Walker*, 27 L. J., M. C. 207; *S. C.* 1 Dears. & B. C. C. 600; 4 Jurist, N. S. 465.

(*a*) *R.* v. *Gibbs*, Dears. C. C. 445. He would now be indicted under 20 & 21 Vict. c. 54, s. 4, as a fraudulent bailee.

back by the prisoner the gloves when sewn, with her name pinned to the parcel. These parcels the prisoner delivered to the manufacturers, and if the parcels were found correct, he received the total amount due to the sewers in one sum, and fresh parcels of unsewn gloves. His duty then was to deliver to each sewer her fresh work, and also the money due to her, deducting his charge. If any work was missing the manufacturer looked to the sewer if found, but if not, to the prisoner for it. The prisoner, according to the course above stated, took out numbers for A. and B., and having received money for both of them from the manufacturers, denied the receipt of it, and applied it to his own use. It was held that he was not the servant of either A. or B., but merely a bailee, and was only guilty of a breach of trust, not of embezzlement.

2. He must, by virtue of such employment (*b*), receive or take into his possession some chattel, money or valuable security, for or in the name or on account of his master.

Servant receiving money without authority to do so, not within the act.

If a servant, who has no authority (*c*) to do so, receive money on account of his master, and appropriate it, he will be held not to have received it *by virtue of his employment*, and cannot be convicted of embezzlement. Therefore, where (*d*) a butcher's apprentice, whose duty it was to go round for orders for meat, but who was never employed to collect debts, on one occasion got a customer, on whom he called, to pay him a bill, and pocketed the money; it was held, by all the judges, that he could not be convicted of embezzlement, as it did not appear, by the evidence, that he was ever employed to receive money for his master, or received the money in question by virtue of his employment. This decision was followed in *R.* v. *Thorley* (*e*). In that case the prisoner was servant of B. and Sons, carriers, who had a warehouse at Birmingham, his employment was to look up goods to be carried by his master's waggons, but he had no authority to receive money, all monies being collected by a collecting clerk. On one occasion, a debtor of B. and Sons went into their counting-house, part of the warehouse at Birmingham, to pay a debt, and seeing the prisoner standing at the desk, with some books near him, supposing him to be a clerk authorized to receive money, paid him the money, for which he gave a receipt in the name of B. and Sons. The prisoner pocketed the money. But it was held, that as he had

R. v. *Mellish.*

R. v. *Thorley.*

(*b*) If the servant be engaged, or his duties defined by a written instrument, *that* of course must be produced, and parol evidence is not admissible to show the terms of hiring or duties unless notice to produce has been given, *R.* v. *Clapton*, 3 Cox, C. C. 126, where Patteson, J., said he remembered two or three unreported cases tried at Warwick, one before Coleridge, J., in which it was held that under such circumstances the agreement must be produced.

(*c*) Authority to *the customer to pay* to the servant would be sufficient, *R.* v. *Aston*, 2 C. & K. 413.

(*d*) *R.* v. *Mellish*, Russ. & Ry. 80.

(*e*) 1 Moo. C. C. 343. *Semble*, this is the case cited by Alderson, B., as *R.* v. *Crawley*, in *R.* v. *Hawtin*, 7 C. & P. 281. See *Barrett* v. *Deere*, Mood. & M. 200, and other cases, *ante*, p. 159.

no authority to receive it, the case was not within the stat. of Geo. 4. And a similar decision was made in *R.* v. *Hawtin* (*f*), where it was also held, that a servant, who, although not authorized to receive money for his master, did so, and pocketed it, could not be convicted of larceny of his master's money, as it had never been in his possession; and not of larceny of the money of the person paying the bill, as *he* had entirely parted with the property of it. *R.* v. *Hawtin.*

Upon similar principles it has been held (*g*), that a person hired to lead a stallion round the country, for which he was to charge for each mare 30*s.*, and not take less than 20*s.*, could not be convicted of embezzlement, although it was proved that he had not accounted for a sum of 6*s.*, which was the whole charge he had made on one occasion for covering a mare, as it was his duty to take not less than 20*s.*, and this sum of 6*s.* was not received by him by virtue of his employment, but contrary to his duty. *R.* v. *Snowley.*

So where (*h*) A. was employed only as town traveller and collector to go round and take orders from customers, and enter them in the books, and receive the money for the goods supplied in consequence; but he had no authority whatever to take or direct the delivery of goods from the shop. A customer having ordered two articles of A. he entered only one in the order book, but B., the prosecutor's carman, delivered both to the customer. An invoice was made out by the prosecutor for the first article, amounting to 6*s.* 6*d.*, and B. entered the second article as 4*s.* 6*d.* A. afterwards received from the customer the whole 11*s.*, but only accounted to the prosecutor for 6*s.* 6*d.* It was held that this was not embezzlement, but larceny, as A. did not receive the 4*s.* 6*d.* for and on account of his master, but contrary to and in breach of his duty towards that master; and A. was acquitted. *R.* v. *Wilson.*

Upon similar principles it had been held (*i*), that a servant authorized to grind corn, brought *with* a ticket, could not be convicted of embezzlement for pocketing money received for grinding corn brought *without* a ticket. *R.* v. *Harris.*

But if a person be employed only on one occasion to receive money, if, acting at that time in the capacity of a servant, he receive money and misappropriate it, it will be embezzlement. Servant employed to receive money, though only on one occasion.

(*f*) 7 C. & P. 281, Alderson, B.

(*g*) *R.* v. *Snowley*, 4 C. & P. 390. Of the authority of this case, however, Patteson, J., after consulting Lord Wensleydale, expressed great doubts in *R.* v. *Aston*, 2 C. & K. 413. In that case a brewer's drayman, who was authorized to sell porter at 9*s.* 6*d.* a dozen, sold some at 6*s.*, saying he would call again for the money. His master having heard of it, told the purchaser he might pay the drayman when he called. He did so, and the drayman having pocketed the money was convicted of embezzlement. In that case, however, the master *authorized* the customer to pay the smaller sum to the servant. And in *R.* v. *Harris*, 23 L. J., M. C. 112; *S. C.* Dears. C. C. 351, Lord Wensleydale said, that "as at present advised, he thought he was right in *R.* v. *Snowley*."

(*h*) *R.* v. *Wilson*, 9 C. & P. 27.

(*i*) *R.* v. *Harris*, 23 L. J., M. C. 112; *S. C.* Dears. C. C. 344.

Spencer's Case.

Thus, where (*k*) a person employed by a carrier was on one occasion directed by his employer to receive a sum of 2*l.*, which he did receive, but misappropriated, he was held rightly convicted of embezzlement.

And servant authorized to receive money from a particular class of customers, who received money from another class, within the act.

And where a servant was authorized to receive money from a particular class of customers, but received and appropriated money from others, it was held that he might be convicted of embezzlement (*l*).

Beechey's Case.

And so (*m*) a clerk, who was employed as evening collector to a carcase butcher, in which capacity it was his duty to receive every evening from the porters employed in the business such monies as they received from customers in the course of the day, and pay the amount over to M. (another clerk), but who was not expected in the course of his employment to receive money from customers themselves, having called on some debtors of his master, and received from them a cheque which he embezzled, was held to have received it "by virtue of his employment," within the meaning of the act of Geo. 3. And a similar

R. v. *Smith.*

decision was made in the case of a toll-collector (*n*), who on one occasion was ordered to receive a debt due to his employers, which he received and embezzled, "because though this was out of the ordinary course of the prisoner's employment, yet as he was servant to H. and J., and in his character of servant to them had submitted to be employed by them to receive the note and monies, and had received them by virtue of his being so employed, the case was within the statute."

Contractor's carman embezzling contractor's money.

R. v. *Beaumont.*

In the following case (*o*) it was held that a contractor's carman, receiving money for the contractee, could not be convicted upon an indictment which charged him with embezzling money belonging to the contractor. The prosecutor W., had contracted with the Great Northern Railway Company to find and provide them with necessary horses and carmen for the purpose of conveying and delivering to the customers of the company the coals of the company in their own waggons, and that *he or his carmen* should, day by day, duly *account* for and deliver to the company's coal-manager all monies received from customers in payment for coals so delivered. By the contract the carmen were to obey the orders of the company's coal-manager in all things connected with the carrying and delivery of coal and receipt and payment of

(*k*) *Spencer's Case*, Russ. & Ry. 299, *ante*, p. 301; and see *R.* v. *Hughes*, 1 Moo. C. C. 370, *ante*, p. 300; and *R.* v. *Smith*, *post*; *R.* v. *Stanbury*, 2 Cox, C. C. 272; *R.* v. *Winnall*, 5 Cox, C. C. 326.

(*l*) *R.* v. *Williams*, 6 C. & P. 626. From *that* report it does not appear that the prisoner was authorized to receive money at all. But in *R.* v. *Hawtin*, 7 C. & P. 281, Alderson, B., puts the decision on the ground stated in the text.

(*m*) *R.* v. *Beechey*, Russ. & Ry. 319; but see *R.* v. *Thorley*, 1 Moo. C. C. 343.

(*n*) *R.* v. *Smith*, Russ. & Ry. 516. But in *Crow's Case*, 1 Lew. 88 (2 Russ. on Cr. 178), which was precisely similar, Lord Wensleydale directed an acquittal, observing that he had never approved of the decision in *R.* v. *Smith*.

(*o*) *R.* v. *Beaumont*, Dears. C. C. 270; *S. C.* 23 L. J., M. C. 54 (1854). This case was twice argued on account of a difference of opinion among the judges.

money. The delivery notes, as well as receipted invoices of the coals, were handed to W.'s carmen, and the former were taken to his office to be entered in his books; but the invoices receipted by the company were left with the customer on payment of the amount. The prisoner B. was servant of W., and was employed by him as carman in the delivery of coals pursuant to the said contract, and it was B.'s duty to pay over direct to the clerks of the company any money he might receive for such coals. B. delivered coals to one of the company's customers, and brought the delivery order to the office to be entered. He received for the coals 5*l.* 10*s.*, leaving the receipted invoice with the customer, but converted the money to his own use. He was indicted for embezzlement as servant of W.; but it was held by a majority of the judges that he could not be convicted, as the evidence showed such a privity as to make him the agent of the company in receiving the money, and that the money was not received on account of W., but on account of the company.

R. v. *Thorpe.*

However, in a subsequent and very similar case (*p*) a different decision was arrived at; but *R.* v. *Beaumont* was not cited. H. was agent of the Great Northern Railway Company at Huddersfield, for the purpose of carrying out goods to be there delivered by the company, and employed his own servants, and used his own drays and horses, and was answerable to the company for monies collected by his servants for the carriage of goods. The prisoner T. was H.'s servant, and, as such, it was his duty to go out with a dray, to take with him goods, and a delivery-book handed to him by J. E., a clerk in the service of the company, and to deliver the goods according to the directions contained in the delivery-book, and to receive the amount of carriage therein specified as due to the company, and *then to account for the sums so received with J. E.* On several occasions T. took out goods for the company, and received from the consignees payments for the carriage as in the delivery-book, amounting to 6*l.*, which sums were paid to, and received by, him as due to the company; and the receipts were given by T. in the name of the company. T. absconded, and never paid these sums either to J. E., or to his master H., but H. paid up the amount to the company in pursuance of his arrangement. T. was indicted for embezzlement *as the servant of H.*, and convicted, and the conviction was upheld as although T. received the money "in the name" of the company, he received it "on account" of H.

Servant stealing money received from master, or

If the money misappropriated has been received from the master (*q*), or if it has been in his possession (*r*), the servant cannot, as we have seen, be convicted of embezzling it, but should be convicted of larceny, which, as we shall hereafter see, may now

(*p*) *R.* v. *Thorpe*, Dears. & B. 562; *S. C.* 27 L. J., M. C. 264 (1858). This case was not argued by counsel.

(*q*) *R.* v. *Hawkins*, 1 Den. C. C. 584; *R.* v. *Beaman*, Carr. & M. 595, where a servant, sent with 6*s.* to buy coals, pocketed one, and was convicted of larceny. *R.* v. *Goode*, Carr. & M. 582; and see *R.* v. *Johnson*, 21 L. J., N. S., M. C. 32.

(*r*) *R.* v. *Murray*, 1 Moo. C. C. 276, *ante*, p. 297; and see *R.* v. *Masters*, and *R.* v. *Watts*, *ante*, p. 298.

which has been in his possession, larceny.

R. v. *Butler.*

be done, although the prisoner be indicted for embezzlement. In a case(*s*), however, where it appeared from the evidence that the prosecutors were spinners, and that the prisoner, who was in their employ, had been from time to time entrusted by them with money for the purpose of paying wages to workpeople; and the duty of the prisoner was to keep an account in a book of the monies which he so received and disbursed, and the book when produced contained three entries made by the prisoner, in each of which he charged his employers with more money than he had paid on their account, and the book had been balanced by the prisoner; but there was no evidence that he had actually accounted with his employers, Wightman, J., stopped an indictment for larceny, observing that, perhaps the prisoner never intended to deliver this account, or, if he did, to deliver it with explanations; but *this* was no accounting, and the prisoner was acquitted.

But if received from third person, though master's agent, held to be embezzlement.

But if a tradesman, suspecting his servant's honesty, give marked money to a friend to purchase something at his shop, and, the servant, instead of putting the money into the till pocket it, this offence will be embezzlement (*t*). If the money has been *put into the till* and is abstracted thence, it is larceny.

So, if servant sent to get change embezzle the change.

Where a servant is sent by his master to get change for a note, gets it and embezzles the *change*, he is not liable at common law for *stealing that*, but should be indicted for embezzlement, as the master never had possession of *the change* (*u*).

3. He must fraudulently embezzle the same, or some part thereof (*x*).

Embezzlement may be defined as the fraudulent retention of personal property of any kind belonging to another, whilst in the course of passing to the possession of the owner. It is not

(*s*) *R.* v. *Butler*, 2 Carr. & K. 340. Where a servant, who was employed by her mistress to pay bills, received from her money to pay a bill of a cheesemonger named Sadler, and brought back the bill with the words "paid Sadler," on it, which she herself had written, having pocketed the money, she was convicted of forgery, *R.* v. *Houseman*, 8 C. & P. 180.

(*t*) *R.* v. *Headge*, Russ. & Ry. 160; *S. C. nom. R.* v. *Hedges*, 2 Leach, 1033. In that case it is said, "It seems to be the opinion of the judges that the stat. 39 Geo. 3, c. 85, did not apply to cases which are larceny at common law." In Russ. on Crimes, vol. ii. p. 168, it is said that the enactment of the stat. Geo. 4, like that of the stat. Geo. 3, has the effect, it should seem, of constituting the offence described in it a larceny. *R.* v. *Hedges* was followed in *R.* v. *Gill*, 1 Dears. C. C. 289; *S. C.* 23 L. J., M. C. 50.

(*u*) *R.* v. *Sullens*, 1 Moo. C. C. 129; *R.* v. *Thomas*, 9 C. & P. 741; *R.* v. *Reynolds*, 2 Cox, C. C. 170. If he steal *the note* it is larceny, as he only had the *custody*, not the possession of *that*, *Bass's Case*, *ante*, p. 286; *R.* v. *Atkinson*, 1 Leach, C. C. 302; and see *R.* v. *Walsh*, Russ. & Ry. 215; *S. C.* 4 Taunt. 258; 2 Leach, C. C. 1054; *R.* v. *Goode*, Carr. & M. 582; *R.* v. *Smith*, 1 Carr. & K. 423; *R.* v. *Johnson*, 21 L. J., M. C. 32; *S. C.* 2 Den. C. C. 310.

(*x*) The embezzlement need not take place *whilst* servant, if the *receipt* were whilst servant, *R.* v. *Lovell*, 2 M. & Rob. 236.

sufficient, however, in support of a charge of embezzlement, to prove a mere receipt and non-payment over of money that is a mere matter of account. A positive refusal to account must be shown (*y*). Thus, where (*z*) a man gave money to his servant to pay taxes, and the only evidence of embezzlement was that the collector had never received the money, it was held that the servant could not be convicted of embezzlement. So, where (*a*) the clerk to the proprietors of a coach, whose duty it was to receive money for passengers, &c., enter the sums in a book, and remit the money weekly to his employers, duly charged himself in his book with all sums received, but did not remit the money to his employers, as he ought to have done, it was held that he could not be convicted of embezzlement.

Refusal to account must be shown.

R. v. *Smith.*

R. v. *Hodgson.*

And in *R.* v. *Jones* (*b*) it was held that a clerk who had merely *omitted to enter in his book* a sum of money which he had received could not be convicted of embezzlement, as it did not appear that he had denied the receipt of it, or gave any false account respecting it.

Mere omission to account no embezzlement.

But if he had rendered *an account, in which the sums received were omitted*, that would be evidence of embezzlement (*c*). And it was held by Coleridge, J. (*d*), that a baker's servant, whose duty it was, on the evening of every day, to render an account of all the monies received during the day for his master, and immediately pay over the amount, having *wilfully omitted* to account, might be convicted of embezzlement, as such an omission was equivalent to a denial of the receipt of the money. And where (*e*) a female servant was sent to receive rent due to her master, received the rent and went off to Ire-

Aliter, of account containing omission.

Wilful omission to account, embezzlement.

Leaving situation and absconding.

(*y*) In addition to the cases cited in the text in support of this position, the case of *R.* v. *Taylor*, 3 B. & P. 596, may be referred to. In that case it was held that the offence was completed in the county in which the clerk refused to account; and, accordingly, that he might be indicted and tried in that county, though he received the money in another county. Now he may be indicted in either, 7 Geo. 4, c. 64, s. 12; and see *R.* v. *Hobson*, Russ. & R. 56; *R.* v. *Murdock*, 21 L. J., M. C. 22; *S. C.* 2 Den. C. C. 298.

(*z*) *R.* v. *Smith*, Russ. & Ry. 267.

(*a*) *R.* v. *Hodgson*, 3 C. & P. 422; but see *R.* v. *Jackson*, 1 C. & K. 384, *post*. And see *R.* v. *Hebb*, 2 Russ. 1242, where Garrow, B., held that a clerk could not be convicted of embezzlement from whose books it appeared that he had received more than he had paid away. See also *R.* v. *Butler*, 2 C. & K. 340, *ante*, p. 308; see, however, *R.* v. *Grove*, *post*, p. 310. In *R.* v. *Lister*, 26 L. J., M. C. 26, Pollock, C. B., said, "I entirely dissent from the dictum of Vaughan, B., in *R.* v. *Hodgson*."

(*b*) 7 C. & P. 833; and see another case against the same person, 7 C. & P. 834.

(*c*) *R.* v. *Creed*, 1 Carr. & K. 63. See *R.* v. *Butler*, 2 C. & K. 340, *ante*, p. 308, a case where a servant had made up his account, but had never delivered it; and it was held no accounting.

(*d*) *R.* v. *Jackson*, 1 Carr. & K. 384. In *R.* v. *Wortley*, 21 L. J., M. C. 44, Lord Campbell said "There are many authorities which show that the denial of the receipt of the money by the prisoner constituted an embezzlement."

(*e*) *R.* v. *Williams*, 7 C. & P. 338.

R. v. *Williams.*

land, it was held, by the same learned judge, that the circumstance of her *quitting her place and going off to Ireland* was *evidence* from which a jury might infer that she intended to appropriate the money, and she was found guilty.

Entry in one book not an accounting where duty to enter in several.

R. v. *Lister.*

So in a case (*f*) in which it appeared to be the duty of L., the prisoner, to receive remittances from customers for his master, to enter the amounts received in a cash book, to furnish an extract from the cash book to the cashier, also to enter the amount to his master's credit in a banker's book, and to pay the amount, with others, from time to time into the bank, and also to enter each amount in his master's ledger to the credit of the customer who paid it. Having received a sum of money from a customer, L. did not enter it in the cash book, or in the extract furnished to the cashier, or in the banker's book, or pay the amount into the bank for his master, but he *did* enter it in the ledger to the credit of the customer. He was nevertheless held to have been rightly convicted of embezzlement, and it was also held that the making the entry in the ledger did not exempt him from punishment.

Promise to account, but omission to do so, no embezzlement.

R. v. *Creed.*

But where a servant, having received money admitted the receipt, *and promised to account, but did not* do so, it was held by Erskine, J. (*g*), that he could not be convicted of embezzlement. In that case, the collector of a water company, as was his practice, gave the turncock three receipts for water rate, desiring him to receive the amounts. He received the money, and when asked, admitted that he had done so, and said he would pay it over on Monday, but absconded.

Claim of right no embezzlement.

R. v. *Norman.*

And where (*h*) the master of a coal ship retained part of the freight received for carriage of coals, *claiming a right* to do so according to a recognized custom between owners and captains in the course of business, Cresswell, J., held that he could not be convicted of embezzlement.

Embezzlement of *some specific sum* must be proved.

R. v. *Grove.*

In support of an indictment for embezzlement, it is, in general, necessary to prove that *some specific sum* has been embezzled. But, in one case, that rule appears to have been relaxed (*i*). In that case the prisoner was cashier in a bank. His duty was to take charge of the cash, and when any payment was made into the bank, in money and paper, the course was for him to hand over the paper to a clerk, and to enter the cash received in a book, kept by himself, called "the money-book." It was also his duty, at the close of each day, to see that the cash in hand agreed with "the money-book," and to strike a balance denoting the sum in cash which he had in his charge, and which ought to have been kept either in a drawer in the counter, of which he had the key, or in a box in the

(*f*) *R.* v. *Lister*, 26 L. J., M. C. 26; *S. C.* 1 Dears. & Bell, C. C. 118. In *R.* v. *Betts*, 1 Bell, C. C. 90, it was held that a miller's foreman, who had authority to sell flour and enter the sale in a book, could not be convicted of *larceny* of some *flour* which he sold without entering the sale in a book, but should have been indicted for *embezzlement* of the *money* received for it.

(*g*) *R.* v. *Creed*, 1 Carr. & K. 63.

(*h*) *R.* v. *Norman*, Carr. & M. 501.

(*i*) *R.* v. *Grove*, 7 C. & P. 635; *S. C.* 1 Moo. C. C. 447.

banking-house, of which also he had the key. One day the cash in the money-book, at the close of business, was 1,762*l.*, which was duly carried forward, and formed the first item in the next day's account. On the latter day, at the close of business, the prisoner made the balance in the money-book 1,309*l.*, which amount he ought to have in one or other of the above-named places of deposit. Upon examination, however, it was found that, instead of 1,309*l.*, the prisoner had only 345*l.*, leaving a deficiency of 964*l.* The prisoner, who *admitted* that he was short about 900*l.*, was indicted for embezzling "money to a large amount, to wit, 500*l.*" The only witness against the prisoner was the partner in the bank, who discovered the delinquency, and who could not say when the money had been purloined, from what persons it had been received, what sort of money had been abstracted, or whether from the till, or upon the receipt from customers. The jury found the prisoner guilty of embezzlement to the amount charged, and, after argument and considerable doubt, eight judges, against seven, held that there was sufficient evidence to go to the jury of the prisoner having received certain monies on a particular day, and for them to find that he embezzled the sum mentioned in the indictment. However, in a subsequent case (*k*), where a shopman was indicted for embezzlement, and the counsel for the prosecution offered to prove that there was a deficiency in the prisoner's accounts, but said that there was no proof of the embezzlement of any particular sum, and cited *R.* v. *Grove*, Alderson, B., directed an acquittal, saying, that "whatever difference of opinion there might be in the case of *R.* v. *Grove*, proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove, at the trial, a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." *R.* v. *Jones.*

And again, in a case (*l*) where it was the duty of a clerk and traveller to receive money for his employer, pay wages out of it, and make entries of all monies received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over balances to his employer. The clerk, having entries in the first book amounting to 25*l.*, entered them in the second as 35*l.*, and two months afterwards, in accounting with his master, made his balance 10*l.* too little by these means, and paid it over accordingly. On this evidence he was indicted for embezzling the 10*l.*, but Williams, J., asked the counsel for the prosecution, "Can you show any precise sum received by the prisoner, on account of his master, and the whole or part of that very sum appropriated by him to his own use?" And, in the absence of such evidence, directed an acquittal. *R.* v. *Chapman.*

(*k*) *R.* v. *Jones*, 8 C. & P. 288. Of this case it may be remarked that Alderson, B., was one of the seven dissentient judges in *R.* v. *Grove*, and in *Grove's Case* there was an admission, which in this case there was not.

(*l*) *R.* v. *Chapman*, 1 Carr. & K. 119; and see *R.* v. *Welch*, 2 Carr. & K. 296.

R. v. *Lambert.*

However, in the following case(*m*), Erle, C. J., allowed a prisoner to be convicted without such specific proof. L. was indicted for embezzling the sum of 270*l.*, part of a sum of 2,783*l.* 7*s.* 9*d.*, which he had received on account of the Receiver-General of her Majesty's Customs. L. was assistant teller to the Customs. It was his duty to receive money from merchants and others who had to pay money to the Receiver-General and enter such receipts in a cash-book. He had also, in the course of his employment, to make certain payments and enter them on the other side of the same book, and balance the amounts each day, paying over so much of the surplus as was in notes to a superior officer and retaining the cash, which was carried to the next day's account. When he paid over the notes it was his duty to give to the same officer a memorandum of the receipts and disbursements of the day. One day he was ordered, about eleven o'clock, to make up his accounts, but continued to receive money until two, when he left the office and did not return. His desk and books were then examined, and in the latter were found, entered as received, several sums, amounting to 2,783*l.* 7*s.* 9*d.*; and on the other side payments, amounting to 130*l.* 13*s.* 3*d.* The balance found, which ought to have been 2,652*l.* 14*s.* 6*d.*, was 270*l.* short. The whole of the money was received between ten and two o'clock on that day. On the part of the prisoner it was contended, that he could not be convicted of embezzlement as there was no evidence showing the appropriation of any particular sum received from any one person. But Erle, C. J., said, "I think the offence is sufficiently made out within the meaning of the statute (*n*), if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded, or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be a constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled."

R. v. *Hall.*

Where a clerk received six bank-notes, on his master's account, in payment of a particular debt, and made an entry in his master's book of a smaller sum as received, but afterwards paid over to his master the *identical notes* which he had received, applying them, in his account, to another debt received by him for his master, he was held to have been rightly convicted of embezzlement in respect of *these six notes* (*o*).

No objection

It is, however, no objection to an indictment for embezzle-

(*m*) *R.* v. *Lambert*, 2 Cox, C. C. 309; Centr. C. C. Aug. 1847; and see *R.* v. *Moah*, Dears. C. C. 626, *post.*

(*n*) It does not appear from the report whether L. was indicted under 7 & 8 Geo. 4, or 2 Will. 4, c. 4; but most probably the *latter.*

(*o*) *R.* v. *Hall*, 3 Stark. 67; *S. C.* Russ. & Ry. 463. Such a case as this is not very likely to occur again since 7 & 8 Geo. 4, c. 29, s. 48.

ment that the master had no right to the money; if it be received by the clerk or servant by virtue of his employment and on account of his master, it will be sufficient (*p*).

that master had no right to the money, if received on his account.

And it has been held to be embezzlement in the secretary to a society fraudulently to withhold money received from a member to be paid over to the trustees; and that he might be stated to be the clerk and servant of the trustees, and the money might be stated to be their property, *though the society was not enrolled*, and though the money ought, in the ordinary course, to have been received by a steward (*q*). However, in another case, where a society, in consequence of administering to its members an unlawful oath, was an unlawful combination and confederacy under the stats. 39 Geo. 3, c. 79 & 57 Geo. 3, c. 19, s. 25, it was held that a person charged with embezzlement as clerk and servant to such society could not be convicted (*r*).

Embezzlement by secretary of society not enrolled.

R. v. *Hall.*

Clerk of illegal society cannot be convicted of embezzlement.

R. v. *Hunt.*

The receipt of the money by the prisoner may now be proved by an *unstamped receipt*, although the amount is above 40*s.* (*s*).

Unstamped receipt.

A person who receives goods, &c., knowing them to have been *embezzled*, may be convicted on a common indictment charging him as a receiver of *stolen* goods. Therefore, where W. and T. were charged on an indictment, first, with *embezzling* certain oats, secondly, with being servants of A. B. and *stealing* his oats, and there was a fourth count charging F. with receiving certain oats feloniously stolen, knowing them to have been feloniously stolen; and the jury found W. guilty on the first count of embezzlement, acquitted T. and found F. guilty on the fourth count of receiving, the conviction was held to be good; and Pollock, C. B., said, "It seems very likely that the statute provided that embezzlement should be deemed stealing for the express purpose of providing for the case of receivers, there being no statute in terms applicable to receiving goods knowing them to have been embezzled" (*t*).

Indictment against receivers.

R. v. *Frampton.*

INDICTMENT (*u*).

By 7 & 8 Geo. 4, c. 29, s. 48, for preventing the difficulties that had been experienced in the prosecution of the last-mentioned offenders, it is enacted that it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of such acts (*x*); and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without speci-

Distinct acts of embezzlement may be charged in the same indictment.

As to allegation and proof of the property embezzled.

(*p*) *R.* v. *Beacall*, 1 C. & P. 312, 454.

(*q*) *R.* v. *Hall*, 1 Moo. C. C. 474.

(*r*) *R.* v. *Hunt*, 8 C. & P. 642.

(*s*) 17 & 18 Vict. c. 83, s. 27. Formerly it could not: *R.* v. *Hall*, 3 Stark. 67; see *R.* v. *Wortley*, 21 L. J., M. C. 44; *S. C.* 2 Den. C. C. 333.

(*t*) *R.* v. *Frampton*, 27 L. J., M. C. 229; *S. C.* Dears. & B. 585.

(*u*) The indictment must show a larceny, *R.* v. *M'Gregor*, 3 B. & P. 106; *R.* v. *Johnson*, 3 M. & S. 540; see *R.* v. *Moah*, Dears. C. C. 626.

(*x*) And see 14 & 15 Vict. c. 100, s. 16, *ante*, p. 295.

fying any particular coin or valuable security, and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Object of that act.

This provision was intended to remove considerable difficulties which formerly beset a prosecutor, and often prevented a prosecution under the repealed statute (*y*). It was found, however, on the other hand, that it frequently caused great hardships to prisoners, who, from the general mode in which indictments are framed under it, could not obtain any satisfactory information as to the specific charges made against them (*z*).

Particulars.

To remedy this evil, it has become the practice for judges, on motion supported by affidavit (*a*), to grant an order for particulars, which ought at least to contain the names of the persons from whom the sums of money are alleged to have been received (*b*).

Prosecutor confined to *one* sum where gross sum charged and several sums proved.

And it has been held (*c*), that if a servant be indicted under this act of Geo. 4, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums on different days, the prosecutor must make his election and confine himself to one sum and one day.

Three counts advisable.

In an indictment under this section it is the safest course to have three separate counts, each of the two last of which should aver that the money was not only received, but embezzled within six months from the day mentioned in the first count.

R. v. *Purchase.*

Where an indictment contained only one count, which charged that within six calendar months the prisoner *received* three sums, laying a day to the receipt of each, and that "on the several days aforesaid" the prisoner embezzled these sums, it was held bad, because it did not show that the sums were *embezzled*

R. v. *Noake.*

within six months of each other (*d*). And where an indictment contained three counts, the first of which was in the usual form, but the second stated "that within six calendar months from the day mentioned in the first count of this indictment," to wit,

(*y*) 2 Russ. on Crimes, 168; see *R.* v. *Moah*, Dears. C. C. 631.

(*z*) It is conceived that this observation applies with twofold force since 14 & 15 Vict. c. 100, s. 13, *post*.

(*a*) The affidavit should state that the prisoner does not know the charges intended to be brought against him, that it is necessary for his defence to be furnished with the particular charges, and that he has applied to the prosecutor for a particular and been refused, see 2 Russ. on Crimes, 189, note.

(*b*) *R.* v. *Hodgson*, 3 C. & P. 422; *R.* v. *Bootyman*, 5 C. & P. 300.

(*c*) *R.* v. *Williams*, 6 C. & P. 626.

(*d*) *R.* v. *Purchase*, Carr. & M. 617.

&c. at &c. the said N. being then and there employed, &c. did by virtue of his employment, &c. *receive*, &c. and the said last-mentioned money, to wit, *on the day and year last aforesaid*, at &c. feloniously did *embezzle*, &c., and the third was in the same form, Cresswell, J., held the second and third counts bad, and confined the prosecutor to evidence on the first count only (*e*).

14 & 15 Vict. c. 100, s. 13. Persons indicted for embezzlement as a clerk, &c., not to be acquitted if the offence turn out to be larceny, and *vice versâ*.

By the 14 & 15 Vict. c. 100, it is enacted, sect. 13, That if upon the trial of any person indicted for embezzlement as a clerk, servant or other person employed for the purpose or in the capacity of a clerk or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement but is guilty of simple larceny, or of larceny as a clerk, servant or person employed for the purpose, or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, and no person so tried for embezzlement or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

Special acts for protection of masters in some trades.

Other Acts of Parliament have also at various times been passed for the protection of masters in trade from frauds and embezzlements of property by their servants. In this place, however, it is unnecessary to do more than refer to those acts, most of which will be found in the Appendix.

After trial for crime, master may sue servant; or after his

When a servant who has robbed his master has been prosecuted and tried for the offence, the master *may*, if he thinks proper, sue him for the damages he has sustained thereby. But he cannot proceed by action until after the trial of the servant, as public policy requires that offenders against the law should be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property or any equivalent or composition for a felony without suit, and of course therefore he cannot be allowed to maintain a suit for that purpose. It would not prejudice the civil remedy that the offender was *acquitted* of the crime, if he was tried (*f*). And it would seem that if the servant die

(*e*) *R.* v. *Noake*, 2 Carr. & K. 620.

(*f*) *Crosby* v. *Leng*, 12 East, 409; *Stone* v. *Marsh*, 6 B. & C. 551; *Marsh* v. *Keating*, 1 B. N. C. 198; *White* v. *Spettigue*, 13 M. & W. 608.

death his executors.

before conviction the master might maintain a suit in equity against the servant's executors (*g*).

Statute of Limitations no bar.

Teed v. *Beere.*

And where a barrister filed a bill to recover out of the assets of a deceased clerk an amount of fees which the clerk had received and embezzled in his lifetime, it was held in equity (*h*), that the Statute of Limitations could not be set up as a defence; for, said Stuart, Vice-Chancellor, "the clerk was clearly a receiver and agent by whom money was received in confidence, and therefore under the same implied contract as that supposed to arise out of the duty of trustees, assignees and executors, of faithfully, diligently and accurately accounting when called upon to his principal (*i*). That being so the money must be considered as money of the employer in the hands of his confidential agent. There had therefore been all along possession by the agent, but no adverse possession, and therefore the bar of the statute, which was founded on adverse possession, did not apply."

Security given on *agreement* not to prosecute set aside.

Mere *threat* not sufficient.

Ward v. *Lloyd.*

If a warrant of attorney is given to his master by a servant charged with embezzlement upon a *distinct agreement* by the master *not to prosecute* the charge, the agreement is illegal, and the court would upon a summary application set aside the warrant of attorney (*k*). But where a warrant of attorney was obtained from a servant upon a threat by his master that if he did not go to his attorney and give satisfactory security for an amount which he ought to have accounted for, he would prosecute him for unlawfully making use of his money, the Court of Common Pleas refused to set it aside as there did not appear to have been any *agreement* not to prosecute. "Such an agreement," said Coltman, J., "is not to be inferred from hasty expressions used by a man when seeking to obtain security for a just debt" (*l*).

OFFENCES COMMITTED BY PERSONS EMPLOYED IN THE PUBLIC SERVICE.

50 Geo. 3, c. 59, s. 2.

Officers giving in false statements of money entrusted to their care, misdemeanor, &c.

By stat. 50 Geo. 3, c. 59, s. 2, it is enacted, that if any officer, collector or receiver, entrusted with the receipt, custody or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him, or intrusted to his care, or of the balances of money in his hands, or under his control, such officer, collector or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the court, and be rendered for ever incapable of holding or enjoying any office under the Crown.

2 Will. 4, c. 4, s. 1.

And by stat. 2 Will. 4, c. 4, after repealing the first section

(*g*) *Wickham* v. *Gattrell*, 23 L. J., Ch. 783.

(*h*) *Teed* v. *Beere*, 28 L. J., Ch. 782.

(*i*) *The Earl of Hardwicke* v. *Vernon*, 14 Ves. 504; *Dinwiddie* v. *Bailey*, 6 Ves. 136.

(*k*) *Ex parte Critchley*, 3 D. & L. 527; and see *Collins* v. *Blantern*, 1 Smith's L. C. 155; *Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371.

(*l*) *Ward* v. *Lloyd*, 6 M. & G. 785.

of 50 Geo. 3, c. 59, it is enacted, sect. 1, that if any person employed (*m*) in the public service of his Majesty, and entrusted, by virtue of such employment (*n*), with the receipt, custody, management or control of any chattel, money or valuable security, shall embezzle the same (*o*), or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed to have stolen the same, and shall, in England and Ireland, be deemed guilty of felony, and, in Scotland, of a high crime and offence, and, on being thereof convicted in due form of law, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned, with or without hard labour, as to the court shall seem meet for any term not exceeding three years (*p*).

Persons in the public service embezzling any money or valuable securities with which they are entrusted to be deemed guilty of felony, &c.

Sect. 2. That every tally, order or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company or society, or to any deposit in any savings bank, and every debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, and every warrant or order for the delivery or transfer of any goods or valuable thing shall, throughout this act, be deemed for every purpose to be included under, and denoted by, the words "valuable security;" and that if any person so employed and entrusted as aforesaid shall embezzle or fraudulently apply or dispose of any such valuable security as aforesaid, he shall be

Sect. 2. What to be included under the words "valuable securities."

(*m*) Acting in the employment is sufficient without proof of formal appointment, *R.* v. *Borrett*, 6 C. & P. 124; *R.* v. *Townsend*, Carr. & M. 178.

(*n*) In *R.* v. *Townsend*, Carr. & M. 178, it was held that a post office letter-carrier, who was in the daily habit of calling at the lodge of G. Infirmary, and there receiving letters with a penny on each to prepay the postage, and taking them to the General Post Office, having embezzled some of the pence thus received, might be convicted under this act; as there was evidence to go to the jury that the pence were received by him by virtue of his employment as a letter-carrier.

(*o*) It was held to be sufficient in an indictment under this act, to state that a clerk embezzled money *received* by him *whilst* such clerk, without any more specific allegation that he *embezzled whilst* clerk, *R.* v. *Lovell*, 2 Moo. & Rob. 236.

(*p*) See now 20 & 21 Vict. c. 3. By 22 & 23 Vict. c. 32, s. 25, it is enacted that the penalties and provisions of 2 Will. 4, c. 4, shall extend and be applicable "to constables and other persons employed in the police of any county, city, borough, district or place whatsoever in like manner as to any person employed in the public service of her Majesty within the meaning of that act, and for all the purposes of the said act the employment of constable, or any other such employment in the police, shall be deemed an employment in the public service of her Majesty."

deemed to have stolen the same within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest or deposit to which such security may relate, or with the money due on such security, or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security.

Sect. 3 is similar to sect. 48 of 7 & 8 Geo. 4, c. 29, ante, p. 313.

Property to be described as the King's.

By sect. 4. That in every such case of embezzlement, or fraudulent application or disposition as aforesaid, of any chattel, money or valuable security, it shall be lawful, in the order of committal, by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money or valuable security as aforesaid in the King's Majesty.

Venue.

And by sect. 5. That every offender against this act may be dealt with, indicted, tried and punished either in the county or place in which he shall be apprehended, or in the county or place where he shall have committed the offence.

R. v. *Moah.*

The following important case (*q*) may be mentioned here. M., an officer of inland revenue, received certain taxes in respect of which he was allowed to retain in his hands a balance of about 300*l.* to meet contingent expenses. It was his duty to render accounts to certain inspectors, and these accounts, when rendered, showed a much larger balance in his hands than he was allowed to retain. At last the General Surveyor of Inland Revenue examined M.'s accounts, and produced to him a statement extracted from them, showing a balance in his hands of upwards of 5,000*l.*, which he admitted. The surveyor then asked him if he was prepared to pay over that balance, or any part of it, and he said no. The surveyor then reminded him that there was a balance of excise duties alone of about 300*l.* standing against him from the previous Monday. M. then took out 255*l.* in bank notes, and a cheque for 25*l.* 8*s.* 4*d.*, and a money order for 14*s.*, and said that was all the money he had in the world. The surveyor then asked him what he had done with the rest, and he said he had spent it in an unfortunate speculation. He was indicted for embezzlement under 2 Will. 4, c. 4, s. 1, and convicted, as it was held by all the judges before whom the case was argued, that there was evidence of the receipt of a particular sum of 300*l.*, and a misapplication of part of it. And Cresswell, J., after stating his opinion to that effect, added: "I by no means say that the conviction is not sustainable as to the 5,000*l.* It is a question of law of great importance, and the authorities are somewhat conflicting. In *R.* v. *Grove* (*r*), under circumstances somewhat similar, the conviction was sustained by a majority of eight judges to seven; but in a subsequent case that decision was not followed, and was said to have proceeded upon some special facts. In *R.* v. *Lambert* (*s*), however, which cannot be distinguished from this case, my brother Erle held that evidence of a general deficiency

(*q*) *R.* v. *Moah*, Dears. C. C. 626; *S. C.* 25 L. J., M. C. 66.

(*r*) *Supra*, p. 310.

(*s*) *Supra*, p. 312.

was sufficient to sustain the indictment. As at present advised, I should say that the prisoner being shown by his own accounts to have a balance in hand of 5,000*l.* due to the Crown, and he making no attempt to explain it on the ground of error or loss of the money, merely says that he has expended it for his own purposes, he may upon that evidence be convicted of embezzling the money, and that having been once indicted for embezzling the whole amount, and either convicted or acquitted, he never could be indicted again for embezzling any part of it. I merely throw this out as showing my grounds for saying that I am by no means satisfied that this indictment is not sustainable as to the whole amount of the prisoner's deficiency."

EMBEZZLEMENT, &c., BY OFFICERS AND SERVANTS OF THE BANK OF ENGLAND.

15 Geo. 2, c. 13, s. 12.

Servants breaking their trust to the company.

By stat. 15 Geo. 2, c. 13, s. 12, it is enacted, that if any officer or servant of the said company, being entrusted with (*t*) any note, bill, dividend warrant, bond, deed or any security, money or other effects (*u*) belonging to the said company, or having any bill, dividend warrant, bond, deed or any security or effects of any other person or persons lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, imbezil, or run away with any such note, bill, dividend warrant, bond, deed, security, money or effects, or any part of them, every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer [death as a felon, without benefit of clergy].

35 Geo. 3, c. 66.

37 Geo. 3, c. 46.

Provisions similar to the above are also contained in 35 Geo. 3, c. 66, s. 6 (whereby certain Irish Annuities were transferred to the Bank of England), and 37 Geo. 3, c. 46, s. 6 (whereby certain other annuities were also transferred to the Bank of England).

Punishment.

4 & 5 Vict. c. 56.

Transportation or imprisonment;

with or without hard labour

The punishment of death, however, for these offences was abolished by 4 & 5 Vict. c. 56, by sect. 1 of which act it is enacted, that persons convicted of offences against the act 15 Geo. 2. c. 13, s. 12, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than seven years, or to be imprisoned for any time not exceeding three years" (*x*).

And by sect. 4, it is also enacted, "That in awarding the punishment of imprisonment for any offence punishable under

(*t*) A person cannot be convicted under this act who merely *has access to* notes, &c., but is not *entrusted with* them, *Bakewell's Case*, Russ. & Ry. 35; and see *Phillips* v. *Huth*, 6 M. & W. 572; *Hatfield* v. *Phillips*, 14 M. & W. 665.

(*u*) In *R.* v. *Aslett*, 1 Bos. & P., N. R. 1, it was held, that Exchequer bills, signed by a person not authorized to sign them, were effects within the meaning of this act. And it was also held that 39 Geo. 3, c. 85, did not repeal this act.

(*x*) See now 20 & 21 Vict. c. 3, which substitutes penal servitude for transportation.

and solitary confinement.

this act, it shall be lawful for the court to direct such punishment to be with or without hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, whether the same be with or without hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet."

Trial of offences.

By sect. 6, such offences are not triable before any justices of the peace at any general or quarter sessions of the peace.

Clerks of the Bank wilfully making out dividend warrants for a greater or less sum than what is really due, felony.

And by stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 9, it is enacted that if any clerk, officer or servant of or other person employed or entrusted by the governor and company of the Bank of England, or the governor and company of merchants commonly called the South Sea Company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, nor less than one year (*y*).

EMBEZZLEMENT, &c., BY OFFICERS AND SERVANTS OF THE BANK OF IRELAND.

21 & 22 Geo. 3, c. 16 (I.)

The stat. 21 & 22 Geo. 3, c. 16, s. 16, relating to the Bank of Ireland, contains a provision similar to that in the 15 Geo. 2, c. 13, s. 12, relating to the Bank of England, *supra*, p. 319. And the stat. 5 & 6 Vict. c. 28, ss. 4, 19, contains provisions regulating the punishment of such offences, exactly similar to those contained in the 4 & 5 Vict. c. 56, ss. 1, 4, and 20 & 21 Vict. c. 3, *supra*, p. 319.

5 & 6 Vict. c. 28.

EMBEZZLEMENT, &c., BY OFFICERS AND SERVANTS OF THE SOUTH SEA COMPANY.

24 Geo. 2, c. 11.

The stat. 24 Geo. 2, c. 11, s. 3, contains a provision similar to that in the 15 Geo. 2, c. 13, s. 12, relating to the Bank of England, *supra*, p. 319. The punishment of these offences is now regulated by the stat. 4 & 5 Vict. c. 56, ss. 1, 4; and 20 & 21 Vict. c. 3, *supra*, p. 319.

4 & 5 Vict. c. 56.

And see *supra*, 11 Geo. 4 & 1 Will. 4, c. 66, s. 9, as to making out false dividend warrants.

OFFENCES BY OFFICERS AND SERVANTS EMPLOYED BY OR UNDER THE POST-OFFICE.

7 Will. 4 & 1 Vict. c. 36, s. 25.

By the stat. 7 Will. 4 & 1 Vict. c. 36, which consolidated the law relating to the post-office, it is enacted, sect. 25, "That every person employed by or under the post-office who shall, contrary to his duty, open or procure or suffer to be opened a

Opening or delaying

(*y*) See now 20 & 21 Vict. c. 3.

post letter, or shall wilfully detain or delay or procure or suffer to be detained or delayed a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall suffer such punishment by fine or imprisonment or by both as to the court shall seem meet. Provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction; or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof, nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state; and in Ireland under the hand and seal of the Lord Lieutenant of Ireland."

post letters a misdemeanor.

Proviso.

Sect. 26. "That every person employed under the Post Office who shall steal or shall for any purpose whatever embezzle, secrete (*z*) or destroy a post letter shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years (*a*), or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

Sect. 26.

Embezzlement, &c., of any letter or packet, felony.

By sect. 32. For the protection of printed votes and proceedings in Parliament, and printed newspapers sent by the post, it is enacted, that every person employed in the Post Office who shall steal, or shall, for any purpose, embezzle, secrete (*b*) or destroy, or shall wilfully detain or delay, in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides, shall, in England and Ireland, be guilty of a misdemeanor and in Scotland of a crime and offence, and, being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet.

Sect. 32.

Stealing, &c., any printed votes or proceedings in Parliament, newspapers or other printed paper, misdemeanor.

Since the passing of this Act of Parliament, which contains no provision for the punishment of embezzlement of monies re-

Embezzling postage of letters.

(*z*) In an indictment for secreting a letter, it is not necessary to state the purpose for which the letter was secreted, *R.* v. *Wynn*, 2 C. & K. 859. In that case a person employed in the post office committed a mistake in the sorting of two letters containing money, and to avoid a supposed penalty attached to such a mistake he threw the letters unopened and the money down a water-closet. Held by all the judges, that there was a larceny of the letters and money; and also a "secreting" of the letters within this statute.

(*a*) See now 20 & 21 Vict. c. 3.

(*b*) See *R.* v. *Wynn*, 2 C. & K. 859, *supra*, note (*z*).

ceived for postage, it is usual (*c*) to indict and proceed against persons in the employ of the Post Office who commit that offence under the provisions of the 2 Will. 4, c. 4, *ante*, p. 316.

Evidence of acting as servant sufficient.

To convict a person under the 7 Will. 4 & 1 Vict. c. 36, evidence of acting in the employ of the Post Office would be sufficient evidence of such employment, without proof of any formal appointment (*d*), though, in an Irish case, it was held that some proof of acting with the sanction of the Post Office authorities was necessary (*e*). Moreover, the prisoner must have been a servant in the employ of the Post Office when he committed the offence imputed to him (*f*). And therefore it was held, under the old Post Office Act, 52 Geo. 3, c. 143, that a servant employed at a receiving house to clean boots, &c., and who used to assist in tying up and sealing the post office bag, was not a servant of the post office (*g*).

But prisoner must have been a servant of the Post Office.

Servant employed in receiving-house not such a servant.

Aliter, person hired by post-mistress to carry letters.

But a man employed by the post-mistress to carry letters from one place to another at a weekly salary paid to him by the post-mistress, but which was repaid to her by the Post Office, was held to be a person employed by the post office within that act (*h*). And now, by the interpretation clause of 7 Will. 4 & 1 Vict. c. 36, the expression "persons employed by or under the Post Office" shall include every person employed in any business of the Post Office, according to the interpretation given to the expression "officer of the Post Office," and that expression shall include the postmaster-general and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider or any other person employed in any business of the Post Office, whether employed by the postmaster-general, or by any person under him, or on behalf of the Post Office.

Meaning of "person employed by or under the Post Office."

"Officer of the Post Office."

R. v. *Reason.*

The prisoner was employed under the Post Office as letter carrier from C. to F. The letters were delivered to him in a sealed bag, which it was his duty to deliver, as he received it, to the postmaster at F., and, on such delivery, his duty was completed. One day he brought from C. the sealed bag containing letters, and delivered it safely at F. post office, to the F. postmaster, whose duty it was to sort the letters in time to make up the bags for the mail passing through F. The prisoner, at the request of the F. postmaster, assisted in sorting, and while so doing, stole a letter containing 1*l.* It was held that he was a person employed under the Post Office within the meaning of 7 Will. 4 & 1 Vict. c. 36, s. 26 (*i*).

What is a "post letter."

By sect. 47 of 7 Will. 4 & 1 Vict. c. 36, the term *post letter* shall mean any letter or packet transmitted by the post under the authority of the postmaster-general, and a letter shall be deemed a post letter from the time of its being delivered to

(*c*) *R.* v. *Townsend*, Carr. & M. 178, *ante*, p. 317, note (*n*).

(*d*) *R.* v. *Rees*, 6 C. & P. 606; *R.* v. *Borrett*. 6 C. & P. 124; *R.* v. *Townsend*, Carr. & M. 178.

(*e*) *R.* v. *Trenwyth*, Ir. Circ. Rep. 172, *sed quære*.

(*f*) But he need not have *embezzled* it *whilst* in the employ, *R.* v. *Lovell*, 2 Moo. & Rob. 236.

(*g*) *R.* v. *Pearson*, 4 C. & P. 572.

(*h*) *R.* v. *Salisbury*, 5 C. & P. 155.

(*i*) *R.* v. *Reason*, 23 L. J., M. C. 11; *S. C.* Jurist (1853), 1014; Dears. C. C. 226.

a post office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter-carrier or other person authorized to receive letters for the post shall be a delivery to the post office, and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant, or agent, or other person considered to be authorized to receive the letter, according to the usual manner of delivering that person's letters shall be a delivery to the person addressed.

Under this act it has been held that a post letter means a letter put in the ordinary way into the post-office. And, therefore, where (*k*) a letter-carrier was suspected, and, for the purpose of trying his honesty, an assistant inspector of letter-carriers enclosed a marked sovereign in a letter addressed to Mr. M., then sealed the letter, and marked it, as if it had been put into the post in the regular way as a paid letter, but it never was posted: on the following day, whilst the prisoner was not attending, the letter was put amongst a heap which he had to deliver, and the prisoner was seen to take the letter into his possession, but never delivered it, and the marked sovereign was found in his pocket: it was held, by all the judges, that he could not be convicted of stealing a "post letter." And a similar decision was made, under similar circumstances, where such a letter had an entirely fictitious address (*l*). In both the above cases, however, the prisoners were convicted of larceny. And, in a subsequent case, where such a letter *was* posted, although with a fictitious address, the prisoner was convicted (*m*).

R. v. *Rathbone.* Trap letter. Fictitious address. *R.* v. *Gardner.* *R.* v. *Young.*

A servant was sent to the post with a letter and a penny to prepay the postage, but finding the shop-door of the receiving house shut, she put the penny inside the letter, fastened it in with a pin, and dropped it into the letter-box, intending that the penny should be applied to the payment of the postage. A messenger, in the General Post Office, stole this letter, with the money in it, and Lord Denman held, that it came within the description of the Act of Parliament, viz., a letter containing money, although the money was not put in for the purpose of being conveyed in the letter (*n*).

R. v. *Mence.*

S., post-mistress at G., received a letter from D., with 1*l.* for a post-office order, to be obtained at L., 3*d.* for the poundage,

R. v. *Bickerstaff.*

(*k*) *R.* v. *Rathbone*, Carr. & M. 220; *S. C.* 2 Moo. C. C. 242; acc. *R.* v. *Shepherd*, Dears. C. C. 606; *S. C.* 25 L. J., M. C. 52. In this case the prisoner was a suspected sub-sorter at the General Post Office. A letter was made up, cash enclosed, and the usual stamp put on the letter. The usual course of posting a letter at the outer hall of the General Post Office is to place it in receiving box. In this case, however, an inspector delivered the letter at the window in the outer hall to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it among the letters which it was prisoner's duty to sort. The prisoner was convicted of simple larceny.

(*l*) *R.* v. *Gardner*, 1 C. & K. 628; but see *R.* v. *Newey*, *ib.* 630, note; *R.* v. *Young*, 2 C. & K. 466.

(*m*) *R.* v. *Young*, 2 C. & K. 466.

(*n*) *R.* v. *Mence*, Carr. & M. 234.

1*d.* for the postage, and 1*d.* for the messenger, who was to get the order. The letter when received by S. was unsealed, but addressed; she in due course delivered it to the prisoner, who was the post-office messenger, with the money, and instructed him to obtain the order at L., inclose it in the letter and post the letter at L. He pocketed the money, and never delivered the letter at L., and it was held by Cresswell, J., that under these circumstances the letter must be considered as a post-letter, and the prisoner in the employ of the post-office; and he was convicted under the statute (*o*).

R. v. *Glass.* But in another case (*p*), where a person delivered two 5*l.* notes to the wife of the postmaster at C. (where money orders were not granted), and asked her to send them by the letter-carrier from C. to W., in order that he might get two 5*l.* money orders at the W. post-office: she gave instructions accordingly to the letter-carrier, and by his desire put the notes into his bag; but he afterwards took them out, and pretended he had lost them (having had no intention of stealing them at the time he received them): it was held by the fifteen judges that this was not larceny, the notes not being in the possession of the prisoner in the course of his duty as a post-office servant.

R. v. *Harley.* A post-office being at an inn, a person was sent to put a letter containing promissory notes into the post. He took it to the inn with money to prepay the postage: he did not put it into the letter-box, but laid the letter with the money upon it upon a table in the passage of the inn, in which passage the letter-box was, and pointed out the letter to the prisoner, who was a female servant in the inn, who said "she would give it to them." The prisoner, who was not authorized by the inn-keeper, her master, to receive letters for him, stole the letter and its contents: and Patteson, J., held, that this was not a post-letter within the meaning of the act; so the prisoner was convicted of larceny (*q*).

11 & 12 Vict. c. 88. Penalty on officers of Post Office issuing money orders fraudulently. By the 11 & 12 Vict. c. 88, s. 4, it is enacted, that every officer of the post-office who shall grant or issue any money-order with a fraudulent intent shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and shall, at the discretion of the court, either be transported (*r*) beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years.

By sect. 5, the property in anything stolen from the Post Office may be laid, in indictments &c., as in "Her Majesty's Postmaster-General," without any further or other description whatsoever.

(*o*) *R.* v. *Bickerstaff*, 2 C. & K. 761.

(*p*) *R.* v. *Glass*, 2 C. & K. 395.

(*q*) *R.* v. *Harley*, 1 C. & K. 89.

(*r*) See now 20 & 21 Vict. c. 3, substituting penal servitude.

CHAPTER IX.

JURISDICTION OF JUSTICES IN DISPUTES BETWEEN MASTERS AND SERVANTS.

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JURISDICTION OF JUSTICES GENERALLY.

THE general jurisdiction of justices in disputes arising between masters and servants is derived from three Acts of Parliament, the provisions of which are so intermixed with each other, in the various decisions upon the subject, that the author is compelled in the first instance to give the statutes and then the decisions upon them ; no other and more satisfactory arrangement of the subject being attainable under the circumstances. By construction of law upon the statute 5 Eliz. c. 4 (which enabled justices to fix the rate of wages) justices of the peace were held (*a*) to have the power of ordering and enforcing the payment of wages to servants in husbandry. But the statute of Eliz. being found deficient as it extended only to such wages as should be rated by the justices, and to servants in husbandry (*b*), and contained no power to admit the servant's

(*a*) *R.* v. *Gouche*, 2 Salk. 441 ; *S. C.* 2 Lord Raym. 820 ; *Shergold* v. *Holloway*, 2 Str. 1002.

(*b*) The jurisdiction of justices in disputes between masters and servants in trades is conferred by various Acts of Parliament relating to particular trades, which, for the convenience of reference, have been arranged alphabetically in a table printed at the commencement of this volume. The principal of those acts (viz. 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; 4 Geo. 4, c. 34, and 5 Geo. 4, c. 96) are given in the text, together with the cases decided upon them, as they are applicable to almost all trades ; the operation of the three first having been extended by 10 Geo. 4, c. 52, to the several manufactures, trades and occupations mentioned in 17 Geo. 3, c. 56. Most of the other acts will be found in the Appendix. In proceedings under these statutes the provisions of 11 & 12 Vict. c. 43 must be attended to, as the case of master and servant is not within the list of excepted cases, sect. 35; see 16 Q. B. 71. But that act does not extend to proceedings under the Factory Acts, see sect. 36.

20 Geo. 2, c. 19.

Differences between masters and certain servants to be determined by a justice of peace where the master resides.

oath in evidence, the 20 Geo. 2, c. 19 was passed. That act, after reciting that the laws then in being for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen and labourers, were insufficient and defective, enacted sect. 1, that after 25th March, 1747 "all complaints, differences and disputes which shall happen or arise between masters or mistresses and servants in husbandry who shall be hired for one year or longer (*c*), or which shall happen or arise between masters and mistresses, and artificers (*d*), handicraftsmen, miners, colliers, keelmen, pitmen(*e*), glassmen, potters and other labourers (*f*) employed for any certain time or in any other manner (*g*), shall be heard and determined by one or more justice or justices of the peace of the county, riding, city, liberty, town corporate or place where such master or mistress shall inhabit (*h*) (although no rate or assessment of wages has been made that year by the justices of the peace of the shire, riding or liberty, or by the mayor, bailiffs or other head officer, where such complaints shall be made, or where such differences or disputes shall arise)(*i*), which said justice or justices is and are hereby empowered to examine upon oath any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glass-

Justices to examine servants, &c., upon oath;

(*c*) See note (*g*), *infra*.

(*d*) By 6 Geo. 3, c. 25, s. 4, and 4 Geo. 4, c. 34, s. 3, "calico printers" are added.

(*e*) In the Stannaries in Devon and Cornwall, 27 Geo. 2, c. 6, s. 2.

(*f*) In *Lowther* v. *Earl of Radnor*, 8 East, 113, a labourer, who contracted to dig and stean a well, was held within this act. That case, however, proceeded upon the facts laid in the *information* before the justice. In order to give a magistrate jurisdiction now, there must either be an actual *service*, or a contract of service. See *Hardy* v. *Ryle*, 9 B. & C. 603; *Lancaster* v. *Greaves*, 9 B. & C. 628. In *Wiles* v. *Cooper*, 3 A. & E. 524, it was considered doubtful whether under this act and 4 Geo. 4, c. 34, justices had power to order payment on an information "for wages for labour as a carpenter." And see *Riley* v. *Warden*, 2 Exc. 59; *Sharman* v. *Saunders*, 13 C. B. 166; *Ingram* v. *Barnes*, 26 L. J., Q. B. 82, as to the meaning of the word "labourer" in the Truck Act, 1 & 2 Will. 4, c. 37; and *R.* v. *Wortley*, 21 L. J., M. C. 44; *S. C.* 2 Den. C. C. 333, *ante*, p. 40, as to the meaning of that word in the Stamp Act.

(*g*) Doubts having arisen whether the words "other labourers employed for any certain time, or in any other manner," extended the act to servants in husbandry hired for a less time than one year, it was enacted by 31 Geo. 2, c. 11, s. 3, that 20 Geo. 2, c. 19, and all and every clause and matter therein contained, should be construed to extend to all servants employed in husbandry, though hired for a less time than one year.

(*h*) By 4 Geo. 4, c. 34, s. 3, *post*, p. 333, the complaint is to be made to "any justice of the peace of the county or place where such servant, &c., shall have *so contracted* "to serve or be employed or be found." And the commitment must show that the magistrate had jurisdiction. *Johnson* v. *Reid*, 6 M. & W. 124; *Lindsay* v. *Leigh*, 11 Q. B. 455; *Askew's Case*, 2 L. M. & P. 429.

(*i*) In *Branwell* v. *Penneck*, 7 B. & C. 539, Bayley, J., said, "These words imply that the legislature did not contemplate *all* labourers, but those only with reference to whom the justices had power to make a rate of wages" under 5 Eliz. c. 4, s. 15.

man, potter, or other labourer, or any other witness or witnesses, touching any such complaint, difference or dispute, and to make such order for payment of so much wages to such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or other labourer as to such justice or justices shall seem just and reasonable, provided that the sum in question do not exceed ten pounds with regard to any servant, nor five pounds with regard to any artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or labourer, and in case of refusal or nonpayment of any sums so ordered, by the space of one-and-twenty days (*k*) next after such determination, such justice and justices shall and may issue forth his or their warrant to levy the same by distress (*l*) and sale of the goods and chattels of such master or mistress, or person employing such artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or other labourer, rendering the overplus to the owners after payment of the charges of such distress and sale (*m*).

20 Geo. 2, c. 19.

and make order for payment of wages due if under a certain sum;

on nonpayment to be levied by distress and sale.

2. That it shall and may be lawful to and for such justice or justices, upon application or complaint made upon oath by any master, mistress or employer (*n*) against any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or labourer, touching or concerning any misdemeanour, miscarriage or ill-behaviour in such his or her service or employment (which oath such justice or justices is and are hereby empowered to administer) to hear, examine and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected (*o*) and held to hard labour for a reasonable time, not exceeding one calendar month (*p*), or otherwise by abating some part of

Justices to hear master's complaints on oath;

and to punish the offender by commitment, abatement of

(*k*) See now 4 Geo. 4, c. 34, s. 5, *post*, p. 334.

(*l*) This distress being virtually an execution, goods distrained are not replevisable, *Wilson* v. *Weller*, 1 Brod. & B. 57.

(*m*) In *Wiles* v. *Cooper*, 3 A. & E. 524, it was held that justices had no power under this section, and 4 Geo. 4, c. 34 and 5 Geo. 4, c. 18, s. 2, to commit the master in default of distress. But that power is now expressly given by 11 & 12 Vict. c. 43, s. 22, under which he may be committed to gaol for any term not exceeding three calendar months. There is, however, no appeal to quarter sessions against an order of justices for payment of weekly wages, under 4 Geo. 4, c. 34, s. 5, *post*; *R.* v. *Bedwell*, 4 E. & B. 213; *S. C.* 24 L. J., M. C. 17.

(*n*) "Or by his, her or their steward, manager or agent," 6 Geo. 3, c. 25, s. 4, and 4 Geo. 4, c. 34, s. 3; "or by his counsel or attorney or other person authorized in that behalf," 11 & 12 Vict. c. 43, s. 10.

(*o*) "Corrected" means whipped, and is a necessary part of the judgment *under this act*, *R.* v. *Hoseason*, 14 East, 607. See *Kirby* v. *Simpson*, 10 Exc. 358. See now, however, 4 Geo. 4, c. 34, s. 3, and *Wood* v. *Fenwick*, 10 M. & W. 195.

(*p*) It has been held that a commitment under this section would not prevent the servant acquiring a settlement by hiring and service where he returned at the end of the sentence and continued to serve his master, *R.* v. *Barton*, 2 M. & S. 329; *R.* v. *Hallow*, 2 B. & C. 739. How far a commitment under 4 Geo. 4, c. 34, would operate to dissolve the contract of hiring so as to set both *master and servant free* from

20 Geo. 2, c. 19.

wages; or dismission.

his or her wages, or by discharging such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer, from his, her or their service or employment; and in like manner also, it shall and may be lawful to and for such justice or justices upon any complaint or application upon oath by any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or other labourer, against such master, mistress or employer, touching or concerning any misusage, refusal of necessary provision, cruelty or other ill-treatment of, to or towards such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or other labourer, and to summon such master, mistress or employer to appear before such justice or justices at a reasonable time to be prefixed in such summons, and such justice or justices shall and may examine into the matter of such complaint, whether such master, mistress or employer shall appear or not, proof being made upon oath of his or her being duly summoned; and, upon proof thereof made upon oath to his or their satisfaction, to discharge such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter or other labourer of and from his said service and employment, which discharge shall be given under the hand and seal or hands and seals of such justice or justices gratis (*q*).

Justices to hear servant's complaints on oath;

and to summon the master, &c.;

and upon satisfactory proof to discharge the servant.

Justices, upon complaint of certain apprentices,

to summon the master, &c.;

and, upon satisfactory proof, to discharge the apprentice.

3. That it shall and may be lawful to and for any two or more such justices, upon any complaint or application by any apprentice put out by the parish, or any other apprentice upon whose binding out no larger a sum than five (*r*) pounds of lawful British money was paid, touching or concerning any misusage, refusal of necessary provisions, cruelty or other ill-treatment of or towards such apprentice by his or her master or mistress (*s*), to summon such master or mistress to appear before such justices at a reasonable time to be named in such summons, and such justices shall and may examine into the matter of such complaint, and, upon proof thereof made upon oath to their satisfaction (whether the master or mistress be present or not, if service of the summons be also upon oath proved), the said justices may discharge (*t*) such apprentice by warrant or certifi-

it at the expiration of the sentence, see *Ex parte Baker*, 26 L. J., M. C. 193; *S. C.* 7 E. & B. 697; *S. C.* in Exch. 26 L. J., M. C. 155; *S. C.* 2 H. & N. 219.

(*q*) A magistrate, acting maliciously under this section, is nevertheless entitled to notice of action under 11 & 12 Vict. c. 44, s. 9, *Kirby* v. *Simpson*, 10 Exc. 358. See the observations of Lord Ellenborough against a master acting as magistrate on a complaint made by his own bailiff against another servant, *R.* v. *Hoseason*, 14 East, 607.

(*r*) This was extended to 10*l.* by 33 Geo. 3, c. 55, and has since been further extended to 25*l.* by 4 Geo. 4, c. 29; or, if nothing at all was paid, 5 & 6 Vict. c. 7.

(*s*) See further, *ante*, p. 131.

(*t*) Under 32 Geo. 3, c. 57, s. 11, the justices may order the apprentice's clothes to be given up, and the master, &c., to pay a sum not exceeding 10*l.* for placing the apprentice out again; and by sect. 12, when such master is liable to take another parish apprentice, he may be fined 10*l.* instead. By 33 Geo. 3, c. 55, the master may also be fined, not exceeding 40*s.* And by 4 Geo. 4, c. 29, justices discharging an apprentice may order all or any part of the premium paid with him to be refunded.

cate under their hands and seals, for which warrant or certificate no fee shall be paid. 20 Geo. 2, c. 19.

4. That it shall and may be lawful to and for such justices upon application or complaint made upon oath by any master or mistress (*u*) against any such apprentice, touching or concerning any misdemeanor, miscarriage or ill-behaviour in such his or her service (which oath such justices are hereby empowered to administer), to hear, examine and determine the same, and to punish the offender by commitment to the house of correction, there to remain and be corrected and held to hard labour for a reasonable time not exceeding one calendar month, *or* otherwise by discharging (*x*) such apprentice in manner and form before mentioned. Justices, upon complaint of masters against apprentices, and proof upon oath, to punish the offender by commitment, &c.

5. Provided nevertheless, that if any person or persons shall think himself, herself or themselves aggrieved by such determination, order or warrant of such justice or justices as aforesaid (save and except any order of commitment) (*y*), he, she or they may appeal (*z*) to the next general quarter sessions of the peace to be held for the county, riding, liberty, city, town corporate or place where such determination or order shall be made, which said next general quarter sessions is hereby empowered to hear and finally determine the same, and to give and award such costs to any of the respective persons, appellant or respondent, as the said sessions shall judge reasonable, not exceeding forty shillings, the same to be levied by distress and sale in manner before mentioned. Appeal. Exception. Costs not to exceed 40*s.*

6. Provided also, that no writ of certiorari (*a*) or other process shall issue or be issuable to remove any proceedings whatsoever had in pursuance of this act into any of his Majesty's Courts of Record at Westminster (*b*). No writ of *certiorari*.

By 6 Geo. 3, c. 25, after reciting that persons employed in several manufactories of this kingdom frequently take apprentices who are very young, and for several years of their apprenticeships are rather a burthen then otherwise to their masters; 6 Geo. 3, c. 25.

(*u*) If the *complaint* is made by the master, it need not be verified by *his* oath, but may be verified by the oath of any other person who knows the fact, *Finley* v. *Jowle*, 12 East, 248.

(*x*) By 32 Geo. 3, c. 57, s. 13, the justices may *also* order the apprentice to be punished "by commitment to the house of correction, there to remain and be corrected (*i. e.* whipped), and kept to hard labour for a reasonable time not exceeding three calendar months." That act also gives an appeal to the quarter sessions.

(*y*) See 6 Geo. 3, c. 25, s. 5, *post*, p. 331, and note (*e*), *ib.*

(*z*) See 4 Geo. 4, c. 34, s. 5.

(*a*) This section, taking away the writ of *certiorari*, would not apply to proceedings under 4 Geo. 4, c. 34. See *R.* v. *Terrett*, 2 T. R. 735. In *Ex parte Lord*, 4 D. & L. 405, a *certiorari* was issued to bring up a conviction under 4 Geo. 4, c. 34. And, as a general rule, the Court of Queen's Bench will grant a *certiorari* to bring up and quash a conviction or order, &c., made by a justice in a case where he has no jurisdiction, or where he *exceeds* his jurisdiction, although it is expressly taken away by statute, *R.* v. *The Justices of Somersetshire*, 5 B. & C. 816.

(*b*) Section 7, excluding the Stannaries from the operation of this act, was repealed by 27 Geo. 2, c. 6.

6 Geo. 3, c. 25.

and that it frequently happens that such apprentices when they might be expected to be useful to their masters, absent themselves from their service: and that the laws in being are not sufficient to prevent these inconveniences, for remedy thereof it is enacted, sect. 1, that after 24th June, 1766, if any apprentice shall absent himself from his master's service before the term of his apprenticeship shall be expired, every such apprentice shall at any time or times thereafter, whenever he shall be found, be compelled to serve his said master for so long a time as he shall have so absented himself from such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service, and so from time to time, as often as any such apprentice shall without leave of his master absent himself from his service, before the term of his contract shall be fulfilled: and in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain upon oath to any justice of the peace of the county or place where he shall reside, which oath such justice is hereby empowered to administer, and to issue a warrant under his hand and seal for apprehending any such apprentice, and such justice upon hearing the complaint may determine what satisfaction shall be made to such master by such apprentice, and in case such apprentice shall not give security to make such satisfaction according to such determination, it shall and may be lawful for such justice to commit every such apprentice to the house of correction for any time not exceeding three months.

Sect. 1.

Justices empowered to oblige apprentice, absenting himself before expiration of his apprenticeship, to serve for such term as he shall be absent;

or to make satisfaction.

Except as to apprentices paying 10*l.* fee;

2. Provided always, that nothing in this act contained shall extend to any apprentice whose master shall have received with such apprentice the sum of ten pounds.

or where seven years shall have elapsed.

3. Provided also, that no apprentice shall be compelled to serve for any time or term, or to make any satisfaction to any master after the expiration of seven years next after the end of the term for which such apprentice shall have contracted to serve, anything herein contained to the contrary notwithstanding.

By sect. 4, after reciting that it frequently happens that artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers and others (*c*), who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled, to the great disappointment and loss of the persons with whom they so contract; for remedy thereof it is enacted, that after the 24th of June, 1766, if any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall contract with any person whomsoever, for any time or term whatsoever, and shall absent himself from his service before the term of his contract shall be completed, or be guilty of any other misdemeanor, that then and in every such case it shall and may be lawful for any justice of the peace of the county or place where any such artificer, calico

Justices empowered to grant warrants against artificers and others not fulfilling their contract, or being guilty of any misdemeanor;

(*c*) This act does not extend to domestic servants, *Kitchen* v. *Shaw*, 6 A. & E. 729, only to persons of the same description as those before enumerated.

printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person with whom such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall have so contracted, *or by his or her steward or agent* (*d*), which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any such artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall not have fulfilled such contract, or have been guilty of any misdemeanor, it shall and may be lawful for such justice to commit every such person to the house of correction for the county or place where such justice shall reside, for any time not exceeding three months nor less than one month. 6 Geo. 3, c. 25. and upon conviction to commit the offender.

5. Provided always, that if any person shall think himself aggrieved by such determination, order or warrant of any justice of the peace as aforesaid (except an order of commitment) (*e*), every such person may appeal to the next general quarter sessions of the peace to be held for the county or place where such determination or order shall be made, such person giving six days' notice of his intention of bringing such appeal, and of the cause and matter thereof, to such justice of the peace and the parties concerned, and entering into recognizance within three days after such notice, before some justice of the peace for such county or place, with sufficient surety, conditioned to try such appeal at, and abide the order or judgment of, and pay such costs as shall be awarded by, the justices at such quarter sessions, which said justices, at their said sessions, upon due proof of such notice being given and of entering into such recognizance as aforesaid, shall and are hereby directed to proceed in, hear and determine the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing or appealed against as they in their discretion shall judge proper and reasonable, and their judgments and orders therein shall be final and conclusive to all parties concerned. Appeal to quarter sessions. Costs.

6. Provided also, that nothing in this act contained shall extend to the stannaries in the counties of Devon and Cornwall, or to impeach or lessen the jurisdiction of the Chamberlain of the city of London, or of any other court within the said city touching apprentices. Limitation of this act with respect to the Stannaries and city of London.

(*d*) See *ante*, p. 327, note (*n*).

(*e*) In *R.* v. *Justices of Staffordshire*, 12 East, 572, it was held that no appeal lies to the sessions against a conviction and commitment in execution for three months of a collier, under this statute, for absenting himself from his master's service, as the order of commitment contained the conviction. And see *Lindsey* v. *Leigh*, 11 Q. B. 455. But see now 11 & 12 Vict. c. 43, s. 14, since which it would seem that the conviction can no longer form part of the commitment, see Archb. Jervis' Act (3rd edit.) p. 136.

4 Geo. 4, c. 34.

By 4 Geo. 4, c. 34 (*f*), after reciting the 20 Geo. 2, c. 19; 6 Geo. 3, c. 25, and 4 Geo. 4, c. 29 (*g*), and that it was expedient to extend the powers of the said acts, it is enacted,

Masters, or their steward or agent, may make complaint against *apprentices.*

sect. 1. That it shall and may be lawful not only for any master or mistress, but also for his or her steward, manager or agent (*h*), to make complaint upon oath against any apprentice within the meaning of the said before recited acts to any justice of the peace of the county or place where such apprentice shall be employed of or for any misdemeanor, misconduct or ill-behaviour (*i*) of any such apprentice; or if such apprentice shall have absconded, it shall be lawful for any justice of the peace of the county or place where such apprentice shall be found, or where such apprentice shall have been employed, and any such justice is hereby empowered, upon complaint thereof made upon oath by such master, mistress, steward, manager or agent, which oath the said justice is hereby empowered to administer, to issue his warrant for apprehending every such apprentice; and, further, that it shall be lawful for any such justice to hear and determine the same complaint, and to punish the offender by abating the whole or any part of his or her wages, or otherwise by commitment to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months.

Justices may abate wages or commit to House of Correction.

Justices may order payment of wages to apprentices provided the sum in question does not exceed 10*l.*

Sect. 2. That all complaints, differences and disputes which shall arise between masters or mistresses and their apprentices, within the meaning of the said before recited acts or any of them, touching or concerning any wages which may be due to such apprentices, shall and may be heard and determined by one or more justice or justices of the peace of the county or place where such apprentice or apprentices shall be employed, which said justice or justices is and are hereby empowered to examine on oath any such master or mistress, apprentice or apprentices, or any witness or witnesses, touching any such complaint, difference or dispute, and to summon such master or mistress to appear before such justice or justices at a reasonable time to be named in such summons, and to make such order for payment of so much wages to such apprentice or apprentices as according to the terms of his, her or their indentures of apprenticeship shall appear to such justice or justices, under all the circumstances of the case, to be justly due (provided that the sum in question do not exceed the sum of ten pounds), the amount of such wages to be paid within such period as the said justice or justices shall think proper, and shall order the same

(*f*) By 10 Geo. 4, c. 52, the provisions of this act are extended to all persons engaged, whether as masters, servants, apprentices or otherwise, in the several manufactures, trades and occupations mentioned in 17 Geo. 3, c. 56 (see Appendix), in the same manner as if such persons had been specially mentioned therein. And see 6 & 7 Vict. c. 40 (also in the Appendix), as to hosiery manufacturers.

(*g*) *Ante*, p. 328, note (*t*).

(*h*) And see *ante*, p. 327, note (*n*).

(*i*) This would not apply where a substantive felony has been committed, or is charged: in which case the prisoner is entitled to the verdict of a jury, *In re Jacklin*, 2 D. & L. 103.

to be paid; and in case of a refusal or nonpayment thereof, such justice or justices shall and may issue forth his and their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, rendering the overplus to the owners after payment of the charges of such distress and sale. 4 Geo. 4, c. 34. On refusal, distress and sale.

3. That if any servant in husbandry, or any artificer, calico printer (*k*), handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall contract with any person or persons whomsoever to serve him, her or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service (*l*) before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same or be guilty of any other misconduct or misdemeanor in the execution thereof or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall have so contracted or be employed or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons or any of them with whom such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall have so contracted, or by his or her or their steward, manager or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any such servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionate part of his or her wages for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof to punish the offender by abating the whole or any part of his or her wages, or to discharge such ser- Justices may issue warrants to apprehend servants in husbandry, artificers, &c. Complaint to be upon oath; and may commit offenders to House of Correction, &c.; or abate the wages or

(*k*) A "designer" is within the act, *Ex parte Ormrod*, 1 D. & L. 825. See further, *post*, p. 336.

(*l*) If any servant, &c. (not being an apprentice or indentured labourer) *enlist* in H. M.'s army, he cannot be proceeded against under this act. See the Annual Mutiny Act, 22 Vict. c. 4, s. 52, *ante*, p. 128. The case of apprentices and indentured labourers is provided for by s. 62.

4 Geo. 4, c. 34.

vant in husbandry, artificer, handicraftsman, calico printer, miner, collier, keelman, pitman, glassman, potter, labourer or other person from his or her contract, service or employment, which discharge shall be given under the hand and seal of such justice gratis (*m*).

discharge the servant.

How servants in husbandry, artificers, &c., shall recover their wages in case of absence of masters, &c.

By sect. 4, after reciting that it frequently happens that such masters, mistresses or employers reside at considerable distances from the parishes or places where their business is carried on, or are occasionally absent for long periods of time, either beyond the seas or at considerable distances from such parishes or places, and during such residence or occasional absences entrust their business to the management and superintendence of stewards, agents, bailiffs, foremen or managers, whereby such servants, artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers or other persons and apprentices are and may be subjected to great difficulties and hardships, and put to great expense in recovering their wages, it is enacted, that in either of the said cases it shall and may be lawful to and for any justice or justices of the county or place where such servant in husbandry, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person or apprentice shall be employed, upon the complaint of any such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person or apprentice, touching or concerning the non-payment of his or her wages, to summon such steward, agent, bailiff, foreman or manager to be and appear before him or them at a reasonable time to be named in such summons, and to hear and determine the matter of the complaint in such and the like manner as complaints of the like nature against any master, mistress or employer are directed to be heard and determined in and by this and the before recited acts, and also to make an order for the payment by such steward, agent, bailiff, foreman or manager to such servant, artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person or apprentice of so much wages as to such justice or justices shall appear to be justly due, provided that the sum in question do not exceed the sum of ten pounds; and in case of refusal or non-payment of any sum so ordered to be paid by such steward, agent, foreman, bailiff or manager for the space of twenty-one days from the date of such order, such justice or justices as aforesaid shall and may issue forth his or their warrant to levy the same by distress and sale of the goods and chattels of such master, mistress or employer, rendering the overplus to the owner or owners, or to such steward, agent, bailiff, foreman or manager, for the use of such master, mistress or employer, after payment of the charges of such distress and sale.

Summons of bailiff, &c., by justices.

Sum not to exceed 10*l*.

If not paid,

distress against master's goods.

Justices may order payment of wages within

By sect. 5, it is enacted that every justice or justices of the peace before whom any complaint shall be made, in pursuance of said recited act 20 Geo. 2, c. 19, or of 31 Geo. 2, c. 11, inti-

(*m*) As to whether or not this section repeals 6 Geo. 3, c. 25, see *Ex parte Baker*, 7 E. & B. 697; *S. C.* 26 L. J., M. C. 193; *S. C.* in Exch. 26 L. J., M. C. 155; 2 H. & N. 219.

tuled, "*An Act to amend an Act made in the third year of the reign of King William and Queen Mary, intituled 'An Act for the better Explanation and supplying the Defects of the former Laws for the Settlement of the Poor,' so far as the same relates to Apprentices gaining a Settlement by Indenture; and also to empower Justices of the Peace to determine Differences between Masters and Mistresses and their Servants in Husbandry, touching their Wages, though such Servants are hired for less time than a Year,*" shall and may order the amount of the wages that shall appear due to any servants in husbandry, artificers, labourers or other person named in the said acts, or either of them, to be paid to the person entitled thereto within such period as the said justice or justices shall think proper; and in case of refusal or non-payment thereof shall and may levy the same by distress and sale in manner directed by the said first-mentioned act; and every order or determination of such justice or justices made under this act shall be final and conclusive, anything in either of the said acts contained to the contrary in anywise notwithstanding (*n*).

4 Geo. 4, c. 34. such time as they may think fit, upon complaint made pursuant to 20 Geo. 2, c. 19; 31 Geo. 2, c. 11. Order final.

6. Provided always, that nothing in this act contained shall extend to impeach or lessen the jurisdiction of the chamberlain of the city of London, or of any other Court within the said city touching apprentices.

Proviso for jurisdiction of chamberlain of London.

CASES PROVIDED FOR BY 4 GEO. 4, c. 34.

This statute, 4 Geo. 4, c. 34, s. 3, provides for two classes of cases. First, where a servant contracts in writing to serve, and does not enter upon his service; and, second, where under a contract, either oral or in writing, he enters upon the service and absents himself from such service (*o*) wilfully or without lawful excuse (*p*). And every order, conviction or warrant of commitment under the statute must show that the case belongs to one or other of these two classes (*q*). The main difference between the two classes is, that in the former a *written* contract is necessary, which it would seem must be signed by *both* (*r*) the contracting parties, since the requirements of this statute are different from those of the Statute of Frauds (which as we have seen only requires an agreement within it to be signed by *the party to be charged*) (*s*), whilst in the latter class oral evidence of a contract will suffice. But in both classes of cases it is equally necessary that there should be *a contract* of hiring and service in some one or other of the capacities mentioned in the statute, or in some capacity *ejusdem generis* with those mentioned in the statute (*t*); and that such contract should be

Two classes.

Difference between them, in *evidence* of contract.

Similarity in *existence* of contract.

(*n*) There is no appeal, *R.* v. *Bedwell*, 4 E. & B. 213; *S. C.* 24 L. J., M. C. 17.

(*o*) *Per* Wightman, J., in *Askew's Case*, 2 L. M. & P. 429.

(*p*) *Seth Turner's Case*, 9 Q. B. 80; and see *Lindsay* v. *Leigh*, 11 Q. B. 455; *Lilley* v. *Elwin*, 11 Q. B. 742; *Rider* v. *Wood*, *Ashmore* v. *Horton*, *post*, pp. 337, 338.

(*q*) *Vide post*, p. 336; *Johnson* v. *Reid*, 6 M. & W. 124; *Lindsay* v. *Leigh*, 11 Q. B. 455; *Askew's Case*, 2 L. M. & P. 429.

(*r*) This point was *raised*, but not *decided*, in *R.* v. *Lord*, 12 Q. B. 762.

(*s*) *Ante*, p. 28.

(*t*) See *Kitchen* v. *Shaw*, 6 A. & E. 729.

Contracts not within the statute.

legally binding upon both parties (*u*). It has therefore been held that a magistrate had no jurisdiction over a contract to weave certain pieces of silk goods at certain prices agreed upon (*x*); or a contract to make and complete a road of certain dimensions, according to a specification for a certain sum (*y*); or a building contract (*z*); or a contract to print certain pieces of woollen cotton goods (*a*), as they were not contracts of hiring and service, but of a different nature. But a contract to serve H. & Co. who were calico printers, as a "designer" for a term of years, has been held to be a contract of service within 4 Geo. 4, c. 34 (*b*). And a journeyman tailor employed by the job and to work on his master's premises, whilst so employed is within the act (*c*). And a dairymaid, who also made beds, was held to be a servant in husbandry within 20 Geo. 2, c. 19 (*d*). The magistrate, however, is the judge whether or not the person be a servant in husbandry, and if there is *any* evidence to support his decision the Court of Queen's Bench will not interfere (*e*).

Contracts within it.

Contract must be one of hiring and service in some capacity mentioned in the statute;

Moreover the contract of service must also be a contract to serve in some one or other of the *capacities* mentioned in the statute. Where therefore a commitment merely stated that complaint had been made against E., *servant* to C., for misconduct, &c. in his said service, it was held insufficient for not stating the nature of the service (*f*). And a warrant which stated that A. B. "a miner" contracted to serve D. & Co. but omitted to add "in the employment of a miner," was held bad (*g*). And so, *à fortiori*, it would be bad if the capacity of service mentioned were one not mentioned, or not *ejusdem generis* with those mentioned in the statute. On the latter ground a menial servant has been held *not* to be within the statute (*h*). Over domestic servants therefore a magistrate has no

or, *ejusdem generis* with those mentioned in it.

Menial ser-

(*u*) *R.* v. *Lord*, 12 Q. B. 757, *post*, p. 337; *R.* v. *Welch*, 2 E. & B. 357.

(*x*) *Hardy* v. *Royle*, 9 B. & C. 603.

(*y*) *Lancaster* v. *Greaves*, 9 B. & C. 628.

(*z*) *West* v. *Smallwood*, 3 M. & W. 418.

(*a*) *Ex parte Johnson*, 7 Dowl. 702; *Johnson* v. *Reid*, 6 M. & W. 124.

(*b*) *Ex parte Ormrod*, 1 D. & L. 825; *S. C.* 1 New Sess. Cas. 38.

(*c*) *Ex parte Gordon*, 25 L. J., M. C. 12.

(*d*) *Ex parte Hughes*, 23 L. J., M. C. 138.

(*e*) See *per* Crompton, J., in *R.* v. *Nunneley*, 27 L. J., M. C. 260.

(*f*) *Re Copestick*, 1 New Sess. Cas. 181; see also *R.* v. *Helling*, 1 Str. 8; *R.* v. *Hullcott*, 6 T. R. 583, acc. It was formerly held that orders of justices for payment of wages sufficiently showed the jurisdiction of justices over the case, if it appeared from them to be a contract of *service*, without showing the *capacity*, but these cases were always wondered at (see *per* Pratt, C. J., in *R.* v. *Cleg*, 1 Str. 476), and at last overruled in *R.* v. *Helling*, *ubi supra*.

(*g*) *R.* v. *Lewis*, 1 D. & L. 822.

(*h*) *Kitchen* v. *Shaw*, 6 A. & E. 729; see *Jones* v. *Williams*, 1 C. & P. 459; *R.* v. *London*, 2 Salk. 442. In *Branwell* v. *Penneck*, 7 B. & C. 536, it was held that a person employed by an attorney to keep possession of goods seized under a *fi. fa.* was not a servant within 20 Geo. 2, c. 19.

jurisdiction under this Act of Parliament, or the other statutes *in pari materia*.

Servants not within the statute.

It has however been held not to be necessary to state under which of the various employments enumerated in 4 Geo. 4, c. 34, s. 3, the service might be classed, but that it was sufficient if the court should be of opinion that the service mentioned was a service within that section (*i*).

If the misconduct complained of amount to felony a magistrate cannot dispose of the case summarily, but it must be sent to a jury (*k*).

The contract must of course be one which is legally binding upon the parties. For where an infant entered into a contract binding him to serve his master, but which authorized the master to stop his wages when the steam-engine stopped working for any cause, and was therefore held to be inequitable and not binding upon the infant, and then absented himself from his work, whereupon the master procured his conviction under 4 Geo. 4, c. 34, s. 3, the Court of Queen's Bench quashed the conviction as there was no binding contract (*l*).

The contract of hiring and service must be a *binding* contract.

R. v. *Lord.*

And a servant who has a lawful excuse for absenting himself, cannot be convicted of an offence under this act. In the two following recent cases the servant was considered to have a lawful excuse for his alleged breach of contract. The first was *Rider* v. *Wood* (*m*). In that case R. entered into the service of W. as an anchorsmith on 4th January, 1859, for an indefinite period, at certain specified prices, determinable on either of the parties giving the other fourteen days' notice of his intention to determine the contract, certain rules and regulations to be observed by the workmen: R. entered into and remained in the service many months. Among other rules was the following:—"Contractors, firemen and daymen, to give fourteen days' notice into the office before leaving their employment and to receive the same." On the 23rd of July he gave the manager of W.'s works the following notice:—"July 23rd, 1859. Mr. Wood Brothers. In the beginning of January last, you reduced our prices with a promise that as soon as trade was a little brisker you would give us our price back again. We now earnestly hope and trust that you will fulfil your promise, as we consider that our price is very small indeed, and we hope that you will take it into your serious consideration—if you will not fulfil your promise we all (the anchorsmiths in your employ) do hereby give to Mr. Wood Brothers fourteen days' notice. Dated this the 23rd of July, 1859. The Anchorsmiths of Saltney." On 6th August R. left, and it was held by the Court of Queen's Bench, that if the magistrates thought that *he left in the bonâ fide belief that he had properly put an end to the service* he could not be convicted under the statute 4 Geo. 4, c. 34, s. 3, for absenting himself from his service, whether the notice was good or bad—*actus non facit reum nisi mens sit rea.*

Lawful excuse for absence.

Rider v. *Wood.*

(*i*) *Ex parte Ormrod*, 1 D. & L. 825; 1 New Sess. Cas. 38.

(*k*) *Ex parte Jacklin*, 2 D. & L. 103; 1 New Sess. Cas. 280.

(*l*) *R.* v. *Lord*, 12 Q. B. 757.

(*m*) 1 Law Times, N. S. 30; *S. C.* 29 L. J., M. C. 1.

Ashmore v. *Horton.*

The other case above alluded to was that of *Ashmore* v. *Horton*(*n*). A. entered into the following agreement:—"Smethwick, 15th May, 1858. I, the undersigned, hereby engage and agree to work for and serve Messrs. J. and W. Horton, in the trade of boiler and gasholder making in every branch or part they may think proper to employ me in, for the term of five years, at the weekly wages of 30*s.* for the first and second years, and 32*s.* for the third, fourth and fifth years. As witness my hand this 15th day of May, 1858. William Ashmore. Joshua and William Horton." This agreement not having been signed by J. and W. Horton at the time, was not then acted on, but on the 15th of October, in the same year, a second memorandum in writing was signed by all parties, being written on the face of the first agreement, and A. thereupon received from H. 9*l.* to defray his travelling expenses to Dundee, where his services were required by H. This money was on the following day repaid by A., who stated, as a reason, that P., by whom he was then employed, insisted on his continuing in his service. The second agreement with H. was as follows: "We, the undersigned, J. and W. H., agree with the undersigned, W. A., to hire him from this day for five years, on the terms and conditions of the written document. And I, W. A., also agree to the same. Dated this 15th day of October, 1858. Joshua and Wm. Horton. Wm. Ashmore." A. did not enter into the service of H. according to the last agreement, but remained with P., by whom he had theretofore been employed for many years, being on 15th of October in P.'s service, under a written agreement, dated 5th July, 1858, for five years. It was held by the Court of Queen's Bench that he could not be charged with a criminal offence for not entering the service of H., as he had a lawful excuse, viz., that he could not do so without violating his contract with P. And Wightman, J., said, "It has from an early period after the statute been held, that the mere act of not entering into the service is not sufficient—it must be not entering into the service without some lawful excuse; and indeed this must obviously be so, for he might be bodily disabled from entering into the service. It seems to me that the statute did not contemplate such a case as this, for the consequence might be that he would be liable to each master. His excuse is that he could not enter into the contract, as he would subject himself to penal consequences at the instance of P. Is this a lawful excuse? I think it is. *It is not the question whether H. has any remedy*, but whether A. is liable under this act. I think he had lawful grounds for not entering into the service."

As to commitment for second offence under same contract.

Ex parte Baker.

The Court of Queen's Bench have held, in the case of *Ex parte Baker* (*o*), that a commitment of a servant under this act, does not *per se* operate to dissolve the contract of hiring, and, therefore, that a servant is bound to return to his master, and his master is bound to receive him, after the expiration of the term of imprisonment to which he has been sentenced. Conse-

(*n*) 1 Law Times, N. S. 58; *S. C.* 29 L. J., M. C. 13.
(*o*) 26 L. J., Q. B. 193; *S. C.* 7 E. & B. 697.

quently they have held that if a servant do not return, he may be convicted of a second offence, and so *toties quoties*. The same case was taken before the Court of Exchequer (*p*), and Watson, B., and Bramwell, B., both considered that the contract was not dissolved by the first conviction, and Martin, B., doubted; but Pollock, C. B., came to the conclusion that the legislature did not intend by 4 Geo. 4, c. 34, s. 3, that a workman should be put in prison more than once for not fulfilling his contract. The opinion of the *majority* of the judges, before whom this question has been brought, appears therefore to be in favour of the power of magistrates to convict a workman twice or more for breach of the same contract. But this, of course, only applies so long as the contract lasts.

Persons aiding and abetting offenders.

Persons aiding and abetting offenders against this act are liable to prosecution under 11 & 12 Vict. c. 43, s. 6, and it would seem to be no defence that the party charged did not know that there was no lawful excuse for the servant absenting himself (*q*).

ORDER OR CONVICTION, AND WARRANT OF COMMITMENT.

Although the provisions of 11 & 12 Vict. c. 43, are applicable to the class of cases now under consideration (*r*), yet, inasmuch as the use of the forms provided by that act is not compulsory (*s*), and other forms are still sometimes used (*t*), (though it is conceived unwisely) (*u*), it is still necessary to advert briefly to the decisions which have taken place upon the validity of various forms of orders or convictions, and warrants of commitment, under 4 Geo. 4, c. 34.

Quære, whether to be construed as an *order*, or as a *conviction*.

It does not appear to have been ever distinctly decided whether this *instrument* is to be regarded as a conviction, and as such construed strictly; or as an order, and as such construed with a less degree of strictness than is required in the construction of a conviction (*x*). The statutes 20 Geo. 2, c. 19, and 6 Geo. 3, c. 25, indeed, both speak (*y*) of an *order* of commitment, an expression which, according to the criterion laid down by Lord Hardwicke in *R.* v. *Lloyd* (*z*), as explained by Denison, J., in *R.* v. *Bissex* (*a*), shows that a commitment under either of

(*p*) *Ex parte Baker*, 26 L. J., M. C. 155; *S. C.* 2 H. & N. 219. The prisoner was discharged by the Court of Exchequer.

(*q*) *Ex parte Smith*, 27 L. J., M. C. 186; *S. C.* 3 H. & N. 227.

(*r*) See Archbold's Jervis' Acts, p. 136; see also *R.* v. *Hyde*, 21 L. J., M. C. 94. They are *not* applicable to cases under the Factory Acts, see s. 35.

(*s*) See sect. 32.

(*t*) See *Askew's Case*, 2 L. M. & P. 429.

(*u*) As those forms, when followed, are sufficient, *R.* v. *Hyde*, *ubi supra*. *Per* Lord Campbell, C. J., *In re Geswood*, 2 E. & B. 954; *In re Allison*, 10 Exc. 561.

(*x*) See generally on this difference between orders and convictions, Paley on Conv. 131; *Ormerod* v. *Chadwick*, 16 M. & W. 367; *R.* v. *Preston*, 12 Q. B. 826.

(*y*) In sect. 5 of each statute.

(*z*) 1 Str. 996.

(*a*) See 1 Chitty's Burn's Just. tit. "Distress;" *S. C.* Sayer, 304; Paley on Conv. 133, 134.

those statutes, should be considered as an *order*, and not as a *conviction;* and it was so treated by Lord Ellenborough in *R.* v. *The Justices of Staffordshire* (*b*). The 4 Geo. 4, c. 34, also appears only to contemplate *one instrument*, by whatever name it is to be called (*c*). And it has been held that under that statute a separate conviction is not necessary; or rather that the commitment may operate as a conviction (*d*). But it has also been held, that it is necessary to the validity of that course of proceeding (embodying the conviction in the commitment), that the warrant of commitment should show that the magistrate had done all that was necessary to make the conviction lawful (*e*); as well as facts bringing the case within the jurisdiction of the magistrate (*f*). "Every instrument," said Lord Wensleydale, in *Lindsay* v. *Leigh* (*g*), "which is to affect a man's liberty or property, out of the course of the common law, ought, on the face of it, to show the authority sufficiently." Where, therefore, the instrument included both a conviction and warrant of commitment, and it did not appear that the contract of service was in writing, or had been entered into (*h*), or that the service mentioned was in some one or other of the capacities mentioned in the statute (*i*), the instrument was held bad. And so, also, where it did not appear that the witnesses were examined upon oath (*k*), or in the prisoner's presence (*l*). So, again, where it only appeared that the servant *absented himself* from his master's service, without adding "wilfully," or "without lawful excuse," or words to that effect (*m*). And it has also been held that a statement that a servant *absented* himself, did not imply that he had entered into his master's service (*n*). And a statement that he absented himself "without *assigning* any sufficient reason," would not do; though "without sufficient reason" perhaps would do (*o*). The commitment must also disclose that the conviction adjudicated as to an abatement of wages (*p*).

Separate conviction not necessary.

Where only one instrument, form of it.

It is not, however, necessary that the evidence should be set out, even though the warrant be of a hybrid character, and operate as a conviction (*q*).

(*b*) 12 East, 572; see 11 Q. B. 464.

(*c*) *Per* Lord Wensleydale, in *Lindsay* v. *Leigh*, 11 Q. B. 464.

(*d*) *Johnson* v. *Reid*, 6 M. & W. 124; *Ex parte Johnson*, 7 Dowl. 702; *Lindsay* v. *Leigh*, 11 Q. B. 464; *Re Bailey*, 3 E. & B. 607.

(*e*) *R.* v. *Tordoff*, 5 Q. B. 939; *S. C.* 1 New Sess. Cas. 171.

(*f*) See *In re Askew*, 2 L. M. & P. 429; *In re Copestick*, 1 New Sess. Cas. 181; and *cas. cit. ante*, p. 336.

(*g*) 11 Q. B. 465.

(*h*) See note (*f*), *supra.*

(*i*) *Ante*, p. 336, *cas. cit.*

(*k*) *In re Gray*, 2 D. & L. 539; *S. C.* 1 New Sess. Cas. 354; *Re Jones*, 1 New. Sess. Cas. 3.

(*l*) *R.* v. *Tordoff*, 5 Q. B. 933; *S. C.* 1 New Sess. Cas. 171.

(*m*) *Seth Turner's Case*, 9 Q. B. 80.

(*n*) *Re Askew*, 2 L. M. & P. 429; *In re Baker*, 26 L. J., M. C. 193, the Court of Queen's Bench thought that an allegation in a warrant of an offence having been committed "in the service," implied that the prisoner *had entered* it.

(*o*) *Re Geswood*, 2 E. & B. 952.

(*p*) *Ex parte Baker*, 26 L. J., M. C. 155.

(*q*) *Re Geswood*, 2 E. & B. 952. The dictum in *Hammond's Case*, 9 Q. B. 92, that it should be set out, was merely *obiter*. *Re Bailey*, 3 E. & B. 607.

And it is by no means *necessary* that the conviction and warrant of commitment should be in the same document (*r*).

The instrument may be simply a warrant of commitment in execution of a previous conviction, in which case it does not require the formalities of a conviction. There *may* be a separate conviction as under ordinary acts, and a warrant founded on it, though by the provisions of this particular act such a conviction may be dispensed with in favour of the prosecution (*s*).

A warrant, however, has been held bad which contained no adjudication of imprisonment (*t*).

Commitment should agree with conviction.

And the warrant of commitment must agree with the conviction.

Wood v. *Fenwick.*

Where, therefore, a conviction under 4 Geo. 4, c. 34, s. 3, adjudged that the servant should be imprisoned in the house of correction, there to remain and be held to hard labour for one month, but the commitment (which was by a separate instrument) required the keeper to receive him into custody, there to remain *and be corrected*, and held to hard labour for one month (following the words of 20 Geo. 2, c. 19, s. 2), it was held that *correction* meant something more than hard labour, and that the commitment was bad, as varying from the conviction and ordering a punishment not warranted by the statute (*u*).

Habeas corpus; or rule to show cause why one should not issue.

A servant convicted under this act, who has reason to think he is wrongly convicted, may apply for a *habeas corpus ad subjiciendum*, or, to save the expense of his being brought up on *habeas corpus*, a rule may be obtained on his behalf from either of the courts at Westminster, calling on the justices, the prosecutor, and the keeper of the gaol in which he is confined, to show cause why a *habeas corpus* should not be issued, or why he should not be discharged out of custody without being brought up. Notice of this rule must be given to all the parties. But if no cause be shown, a *habeas corpus* must still be issued before the prisoner can be discharged (*x*).

(*r*) *Re Gray*, 2 D. & L. 549; *Re Bailey*, 3 E. & B. 607; *S. C.* 23 L. J., M. C. 161.

(*s*) *Re Bailey*, *ubi supra*.

(*t*) *Hammond's Case*, 9 Q. B. 92; *Re Geswood*, 2 E. & B. 952.

(*u*) *Wood* v. *Fenwick*, 10 M. & W. 195; see *Kirby* v. *Simpson*, 10 Exc. 358; *S. C.* 23 L. J., M. C. 165.

(*x*) In *Ex parte Cross*, 2 H. & N. 354, Pollock, C. B., in granting a rule of this sort in the Court of Exchequer, referred to *Ex parte Martins*, 9 Dowl. 194, in which Patteson, J., "was informed by one of the Masters of the Crown Office, that it was never the practice in the Queen's Bench to waive the necessity of a party appearing before the court on a *habeas corpus*, where the validity of the commitment is to be discussed, and, though he regretted that the defendant should be put to the expense of a *habeas corpus*, said he could not alter the practice in that particular." "However," said Pollock, C. B., "we have adopted a different practice." The case of *Ex parte Jacklin*, 2 D. & L. 103, in which Coleridge, J., granted such a rule, and the note of the reporter to that case, "that the same course had been adopted in several late cases" were not called to the attention of the Chief Baron. The practice now seems to be similar in all the courts. In *Ex parte Geswood*, 2 E. & B. 952, the validity of the commitment was discussed, and the prisoner ordered to be discharged without being brought personally into court.

Return to *habeas corpus*, showing both bad and good warrants sufficient.

R. v. *Richards.*

Second good warrant.

Affidavits on return.

Where a return by a gaoler to a *habeas corpus*, set forth a bad conviction and warrant of a justice under 4 Geo. 4, c. 34, and also proceeded to set forth a good conviction and warrant under that statute (which was delivered a week after, though dated the same day as the first), it was held that the prisoner was not entitled to be discharged (*y*).

And where a writ of *habeas corpus* was obtained upon an affidavit setting out a *bad* warrant, a *second* good warrant was allowed to be substituted for it on the return to the writ (*z*).

Upon a return to a *habeas corpus*, it is open to the prisoner to show by affidavit that there was *no* evidence from which the justice might reasonably draw an inference that the relation of master and servant existed between the prisoner and his employer, as that would show that the justice had no jurisdiction. But if the affidavits show evidence both ways, the prisoner will be remanded (*a*). And affidavits will not be permitted to show that the offence was committed beyond the jurisdiction of the justice. That is a question of fact which must be tried by him at his peril (*b*). Where a warrant is good on the face of it, it is doubtful whether affidavits are admissible raising objections not appearing on the warrant, as, for instance, disclosing a former conviction for the same offence (*c*).

ARBITRATION OF DISPUTES BETWEEN MASTERS AND WORKMEN.

5 Geo. 4, c. 96.

The stat. 5 Geo. 4, c. 96, which consolidated and now regulates the law relative to the arbitration of disputes between masters and workmen, also gives to justices (*d*) certain powers in such cases; and it is, therefore, conceived, that the provisions of that statute may most appropriately be brought before the reader in this place (*e*).

Sect. 1.

Repeals prior acts.

The first section, after reciting that it is expedient that the laws relative to the arbitration of disputes between masters and workmen should be consolidated and amended, and one general law made applicable to every description of trade and manufacture, repeals a variety of former enactments upon the subject. The act then proceeds (sect. 2) to enumerate the causes of dispute which may be referred to arbitration in the following terms :—

Causes of dispute that may be referred.

2. That the following subjects of dispute arising between masters and workmen, or between workmen and those employed by them, in any trade or manufacture, in any part of the United Kingdom of Great Britain and Ireland, *may* (*f*) be

(*y*) *R.* v. *Richards*, 5 Q. B. 926.

(*z*) *Ex parte Smith*, 27 L. J., M. C. 186.

(*a*) *Re Bailey*, 3 E. & B. 607.

(*b*) *Ex parte Smith*, 27 L. J., M. C. 186.

(*c*) *Ex parte Baker*, 26 L. J., M. C. 155; *S. C.* 2 H. & N. 219.

(*d*) By 7 Will. 4 & 1 Vict. c. 67, s. 3, it is enacted that whereever the expression "justice of the peace" occurs in 5 Geo. 4, c. 96, it shall be construed to mean "magistrate."

(*e*) By 19 & 20 Vict. c. 46, it is enacted that nothing contained in 5 & 6 Will. 4, c. 70 (an act for abolishing in Scotland imprisonment for civil debts of small amount) shall apply to imprisonment under 5 Geo. 4, c. 96.

(*f*) Upon the question as to *how far* this is *compulsory* and

settled and adjusted in manner hereafter mentioned; that is to say, disagreements respecting the price to be paid for work done, or in the course of being done, whether such disputes shall happen or arise between them respecting the payment of wages as agreed upon, or the hours of work as agreed upon, or any injury or damage done or alleged to have been done to the work, or respecting any delay or supposed delay in finishing the work, or the not finishing the work in a good and workmanlike manner, or according to any contract, or to bad materials; cases where the workmen are to be employed to work any new pattern which shall require them to purchase any new implements of manufacture, or to make any alteration upon the old implements, for the working thereof, and the masters and workmen cannot agree upon the compensation to be made to such workman for or in respect thereof; disputes respecting the length, breadth or quality of pieces of goods, or in the case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof; disputes respecting the wages or compensation to be made for pieces of goods that are made of any great or extraordinary length; disputes in the cotton manufacture respecting the manufacture of cravats, shawls, pelicat, romal and other handkerchiefs, and the number to be contained in one piece of such handkerchiefs; disputes arising out of, for or touching the particular trade or manufacture or contracts relative thereto, which cannot be otherwise mutually adjusted and settled; disputes between masters and persons engaged in sizing or ornamenting goods; but nothing in this act contained shall authorize any justice or justices acting as hereinafter mentioned, to establish a rate of wages, or price of labour, or workmanship at which the workmen shall in future be paid, unless with the mutual consent of both master and workmen; provided always, that all complaints by any workman as to bad materials shall be made within three weeks of his receiving the same, and all complaints arising from any other cause shall be made within six (*g*) days after such cause of complaint shall arise. 5 Geo. 4, c. 96.

Justices not to establish a rate of wages without consent.

Limitation of time within which workmen to lodge their complaints.

3. That whenever such subjects of dispute shall arise as aforesaid, it shall be lawful for the master and workman, or either of them, to demand and have an arbitration or reference thereof, in manner following, that is to say, where the party complaining and the party complained of shall come before or agree by any writing under their hands to abide by the determination of any justice of the peace or magistrate of any county, riding, division, stewartry, barony, city, burgh, town or place within which *the parties* reside (*h*), it shall and may be lawful

Appointment of referees.

ousts the jurisdiction of the superior courts *when* an *arbitration is demanded* under sect. 3, the following cases may be consulted with advantage, though they did not arise under this act, *Crisp* v. *Bunbury*, 8 Bing. 394; *Ex parte Payne*, 5 D. & L. 679; *Morrison* v. *Glover*, 4 Exc. 430; *Doe* v. *Glover*, 15 Q. B. 103; and *M'Dougal* v. *Paterson*, 6 Exc. 337, note; *S. C.* 2 L. M. & P. 681.

(*g*) Extended to fourteen days by 7 Will. 4 & 1 Vict. c. 67.

(*h*) By 7 Will. 4 & 1 Vict. c. 67, s. 2, this power may be exercised by the justices or magistrates of the district where *the party complained against* resides.

5 Geo. 4, c. 96.

for such justice of the peace or magistrate to hear and finally determine in a summary manner the matter in dispute between such parties; but if such parties shall not come before or so agree to abide by the determination of such justice of the peace or magistrate, then it shall be lawful for any such justice or magistrate, and such justice of the peace or magistrate is hereby required, on complaint made before him and proof by the examination of the party making such complaint, that application has been made to the person or persons against whom such cause of complaint has arisen, or his, her or their agent or agents, if such dispute has arisen with such agent or agents, to settle such dispute, and that the same has not been settled upon such complaint being made, or, where the dispute relates to a bad warp, that such cause of complaint has not been done away with within forty-eight hours after such application, to summon before him such person or persons, or agent or agents, on some day not exceeding three days, exclusive of Sunday, after the making such complaint, giving notice to the person making such complaint of the time and place appointed in such summons for the attendance of such person or persons, agent or agents as aforesaid, and if at such time and place the person or persons so summoned shall not appear by himself, herself or themselves, or send some person on his, her or their behalf to settle such dispute, or appearing shall not do away such cause of complaint, then and in such case it shall be lawful for such justice, and he is hereby required, at the request of either of such parties, to nominate arbitrators or referees for settling the matters in dispute, and such justice shall then and there at such meeting propose not less than four nor more than six persons, one-half of whom shall be master manufacturers or agents or foremen of some master manufacturer, and the other half of whom shall be workmen in such manufacture, such respective persons residing in or near to the place where such disputes shall have arisen; out of which master manufacturers, agents or foremen the master engaged in such dispute or his agent shall choose one, and out of which workmen so proposed the workman or his agent shall choose another who shall have full power to hear and finally determine such dispute.

Regulations for appointment of other referees where those appointed refuse or delay to accept the reference, or accepting do not act therein.

4. That in case any or either of the persons so proposed by any such justice shall refuse or delay to accept such arbitration, or, accepting shall not act therein within two days after such nomination, the justice shall proceed to name another or other persons of the descriptions aforesaid in the room of the persons so refusing as aforesaid to be arbitrator or arbitrators in the place of any such arbitrator or arbitrators so refusing or delaying to accept or who shall not act; and in every case of a second nomination the arbitrators shall meet within twenty-four hours after the application for the same, and at the same place at which the meeting of the referees first named was appointed, or at some other convenient place as the justice may appoint; and the expense of every such application for the appointment of a second referee shall be borne and defrayed by the party through whose default or the default of whose referee such application is rendered necessary, and the justice making such second ap-

pointment shall certify the same in the form for that purpose set forth in the act (*i*) or in some other form to the like effect; and in every case where a second arbitrator shall be appointed as aforesaid, and such second arbitrator shall not attend at the same time and place appointed for settling the matters in dispute, it shall be lawful for the other arbitrator at such time and place to proceed by himself to the hearing and determining of the same matters in dispute; and in such case the award of such sole arbitrator shall be final and conclusive as to all matters in dispute submitted to such arbitrator, without being subject to review, appeal, or suspension. 5 Geo. 4, c. 96.

5. That the arbitrators or referees being so nominated as aforesaid, the said justice shall thereupon appoint a place of meeting according to the directions of this act, and also a day for the meeting; notice of which nomination and of the day of meeting shall thereupon be given by such justice to the persons so nominated arbitrators or referees, and to any party to any such dispute who may not have attended the meeting before such justice as aforesaid; which appointment shall be by such justice certified in the form there given (*k*), or in some other form to the like effect; and the person so appointed as aforesaid shall hear and examine the parties and their witnesses and determine such dispute within two days after such nomination, exclusive of Sundays; and the determination of such arbitrators shall be final and conclusive. Meeting of referees. Notice of which to be given.

6. That in all cases where complaints are made respecting bad warps or utensils by workmen, the place of meeting of the referees shall be at or as near as may be to the place where the work shall be carrying on; and in all other cases at or as near as may be to the place or places where the work has been given out. Place for the meeting of the referees.

7. Provided, that if any person so complaining as aforesaid shall not attend or send some person on his or her behalf at the time and place appointed by such justice of the peace for the purpose of naming such persons as aforesaid, such person shall not in such case be entitled to the benefit of this act; and if any person against whom any such complaint shall have been made as aforesaid shall not attend or send some person on his or her behalf, the justice of the peace shall thereupon nominate a person for him out of such persons so proposed as aforesaid. Attendance of parties.

8. That the said arbitrators and referees shall meet at the time and place fixed by the justice of the peace by whom such referees were appointed, and shall by inspection of the work in regard to which the dispute may have arisen, by hearing and examining the parties, or any other persons on their behalf, or that attend to give evidence respecting the matters in dispute, upon oath (which the said arbitrators and referees are hereby empowered to administer) or otherwise, or by otherwise ascertaining the true state of the case in such manner as to such arbitrators and referees shall appear necessary, proceed to determine the matter or matters in dispute referred to them; and the award Mode of investigation of complaint by arbitrator.

(*i*) See the form in the Appendix.

(*k*) See this form in the Appendix.

5 Geo. 4, c. 96. to be made by such arbitrators and referees shall be final and conclusive between the parties without being subject to review or challenge by any court or authority whatsoever.

Arrest and commitment of refractory witnesses.

9. That it shall be lawful for any arbitrator or arbitrators, referee or referees, and he and they are hereby authorized and required at the request in writing of any of the parties to issue his or their summons to any witness or witnesses to appear and give evidence before such arbitrator or arbitrators, referee or referees, at the time and place appointed for hearing and determining any such dispute, and which time and place shall be specified in such summons; and if any person so summoned to appear as a witness as aforesaid, shall not appear before such arbitrator or arbitrators, referee or referees at the time and place specified in such summons, or offer some reasonable excuse for the default, or appearing according to such summons shall not submit to be examined as a witness and give his evidence before such arbitrator or arbitrators, referee or referees touching the matter of such dispute, then and in every such case it shall be lawful for any one or more of his majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town or place where such dispute shall have arisen, and they are hereby authorized (proof on oath in the case of any person not appearing according to such summons having been first made before such justice or justices of the due service of such summons on every such person by delivering the same to him, or by leaving the same twenty-four hours before the time appointed for such person to appear before such arbitrator or arbitrators, referee or referees at the usual place of abode of such person) by warrant under the hands of any such justice or justices to commit any such person so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of any such justice or justices, there to remain without bail or mainprize for any time not exceeding two calendar months, nor less than seven days, or until such person shall submit himself to be examined, and give his evidence before such arbitrator or arbitrators, referee or referees as aforesaid: provided always, that in case such dispute shall be heard and determined before such offender shall submit to be examined and give evidence as aforesaid, then and in every such case he, she or they shall be imprisoned the full term of such commitment.

Proviso.

Adjournment of complaint from referees to a justice;

10. That in case such arbitrators and referees so appointed cannot agree upon and decide such matter or matters in dispute so referred as aforesaid, or shall not make and sign their award within three days after the date of the order of such justice certifying their appointment, then the said arbitrators and referees shall without delay go before the justice by whom they were appointed, and in case of his absence or indisposition, before any other of his majesty's justices of the peace acting in and for the county, stewartry, riding, division, barony, city, burgh, town, liberty or place, and residing nearest to the place where the meeting to settle such dispute shall have taken place, and shall state to such justice or justices who may be present the points in difference between them the said arbitrators and referees,

which points in difference the said justice or justices shall and is and are hereby authorized and required to hear and determine upon the statement of the arbitrators and referees; and the said justice or justices is and are hereby directed and required to settle and determine the matter in dispute with all possible dispatch, and, in all cases, within the space of two days after the expiration of the time hereby allowed to the arbitrators and referees, to make and sign their award; and the determination of such justice or justices shall be final and conclusive between the parties so differing as aforesaid, without being subject to review or challenge by any court whatsoever. 5 Geo. 4, c. 96. whose determination final.

11. That if either arbitrator or referee shall neglect or refuse to go before such justice of the peace in the manner herein directed, it shall and may be lawful for such justice, after summoning the arbitrators to attend him, to determine the matter or matters in dispute upon the statement and representation of either of the arbitrators who shall come before him. Proceeding where one referee refuses to go before justice.

12. Provided always, that no justice of the peace, being also a master-manufacturer or agent, shall act as such justice under this act. Master not to act as justice.

13. Provided always, that as well in all such cases of dispute as aforesaid, as in all other cases, if the parties mutually agree that the matter in dispute shall be arbitrated and determined in a different mode to the one hereby prescribed, such agreement shall be valid, and the award and determination thereon final and conclusive between the parties; and the same proceedings of distress, sale, and imprisonment as hereafter mentioned shall be had towards enforcing such award (by application to any justice of the peace of the county, stewartry, riding, division, barony, city, town, burgh or place within which the parties shall reside) as are by this act prescribed for enforcing awards made under and by virtue of its provisions. Disputes may be adjusted by any other mode of arbitration upon which the parties may agree.

14. Provided always, that where any work shall have been delivered to any workman by the agent or servant of any master or masters to be, when finished, delivered to such agent or servant; and also where two or more persons shall carry on the business of such manufacture as partners; in every such case respectively the like proceedings shall and may be had and made against such agent, servant or any partner, and shall be as effectual, as if the same had been had and made against the principal or all the partners; and all the said persons respectively shall obey the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute; and shall be subject to the same proceedings and consequences for refusing or delaying to abide by or perform the same as if the proceedings had been had against the principal or against all the partners. Partners, agents, and servants to be considered principals.

By sect. 15 it is enacted, that it shall be lawful in all cases for any master or workman by writing under his hand to authorize any person to act for him in submitting to arbitration, and attending arbitrators or justices, touching the matter of any arbitration. Master not resident may depute another person.

16. Provided also, that in all cases where any proceedings may be had against a master or masters under this act, or Provision for the case of

5 Geo. 4, c. 96. the master becoming bankrupt after proceedings commenced.

where such proceedings shall have been commenced, and the master or masters shall become or be bankrupt, or any assignment of his or their estate or effects shall have been made under the said bankruptcy, or otherwise by deed or in law, the factor or trustee upon, or the assignee or assignees of, such estate or effects shall be liable to the proceedings authorized by this act against the master or masters, as fully as the master or masters was or were before the bankruptcy or assignment; and such proceedings may be commenced or carried on against such factor, trustee, assignee or assignees, who shall fulfil and abide by the award made thereupon, and all such order or orders as shall be made by the said justice or justices in or respecting the matters in dispute, and shall be subject to the same proceedings and consequences for wilfully refusing or delaying to abide by or perform the same, as if the proceedings had been had against the master or masters before his or their bankruptcy, or the assignment of his or their estate or effects: provided that all sums of money to be paid in pursuance of such award or orders, shall be recoverable only out of the estate or effects of such master or masters, and not out of the proper money of such factor, trustee, assignee or assignees.

In whose name proceedings shall be, where the complainant is a married woman, or an infant.

17. That where any married woman or infant under the age of twenty-one years, shall have cause of complaint in any of the cases provided for by this act against any master or masters, his or their agent or servant, or factor or trustee, or assignee or assignees, as aforesaid, such complaint may be lodged, and all further proceedings thereupon had, by and in the name of the husband of such married woman, and of the father, or if dead, of the mother, or, if on the death of both parents, of any of the kindred of any such infant, or of the surety or sureties in any indenture of apprenticeship of any such infant, being an apprentice, or of any person nominated by such infant, if he or she shall not have parent, kindred or surety; and all such proceedings shall be as effectual, valid and binding, as if such married woman was sole, and such infants were of full age, and pursued by themselves the remedies provided by this act.

Tickets of particulars to be given out with work.

18. That with every piece of work given out by the manufacturer to workmen to be done, there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon, and which said note or ticket, in the event of dispute between the manufacturer and workman, shall be evidence of all matters and things mentioned therein, or respecting the same (*l*).

Duplicates of such tickets.

19. That a duplicate of every such note or ticket shall be made and kept by the master or agent delivering the same, which duplicate shall be evidence of all the matters and things therein contained, in case the workman shall not produce to the arbitrators or the said justice, as the case may be, the said note or ticket so delivered to him with the said work.

Manufacturers receiv-

20. That it shall not be allowable to any manufacturer who shall have received into his possession any article, without ob-

(*l*) As to tickets of work to be delivered to persons employed in the manufacture of *hosiery*, see 8 & 9 Vict. c. 77; and to *silk weavers*, 8 & 9 Vict. c. 128, in the Appendix.

jection made within twenty-four hours, by himself, or his clerk or foreman, afterwards to make any complaint on account of work so received. 5 Geo. 4, c. 96. ing articles not to complain afterwards.

21. Provided always, that if the parties, by and between whom the said reference shall take place as aforesaid, shall think it expedient or be desirous to extend the time hereby limited for the making the award or umpirage, it shall and may be lawful for them to extend the same accordingly by indorsement, according to the form in the schedule annexed to the act, on the back of the order of the justice of peace certifying the appointment of the referees, to be signed by both of them, in the presence of one or more credible witness or witnesses. Extension of time limited for making award.

22. That the award or umpirage to be made upon any reference demanded under this act, shall and may be drawn up and written at the foot or upon the back of the said order certifying the appointment of the referees, according to the form in the schedule to this act annexed (*m*). Form of award.

23. That upon fulfilment of the award or umpirage, the same shall be acknowledged by the party in whose behalf the same was made, by an acknowledgment at the foot of the said award in the form of the schedule to this act annexed, which, with the award, shall thereupon be delivered to the party fulfilling the same. On award being fulfilled, fulfilment to be acknowledged.

24. That if any party shall refuse or delay to fulfil an award under this act for the space or term of two days after the same shall have been reduced into writing, it shall be lawful for any such justice as aforesaid, on the application of the party aggrieved, and he is hereby required by warrant under his hand, according to the form in the schedule to the act annexed, or in some other form to the like effect, to cause the sum and sums of money directed to be paid by any such award, to be levied by distress and sale of any goods and chattels of the person or persons liable to pay the same, together with all costs and charges attending such distress and sale, such sale to take place within such time not exceeding five days, as the said justice shall think proper, and the overplus, if any, to arise by such sale, to be rendered to the owners of the goods and chattels distrained; and in case it shall appear by any return to such warrant that no sufficient distress can be readily had, which return may be in the form contained in the schedule to the act annexed, or in some other form to the like effect, it shall be lawful for any such justice as aforesaid, and he is hereby required, by warrant under his hand, according to the form in the schedule to the act annexed (*n*), or in some other form to the like effect, to commit the person or persons so liable as aforesaid to the common gaol, or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months. Performance of award may be enforced by distress; and, failing that, the party refusing shall be imprisoned.

By sect. 25, after reciting that cases may occur where the recovery of such sum or sums of money by distress and sale of the goods and chattels of the defaulter, may appear to the justice

(*m*) See these forms in the Appendix.

(*n*) See the form in the Appendix.

5 Geo. 4, c. 96.

In certain cases the warrant of distress shall be withheld and the defaulter committed to prison.

or justices of the peace by whom the warrant is to be issued, to be attended with consequences ruinous, or in an especial manner injurious to the defaulter and his family; to prevent such consequences it is enacted, that the said justice or justices, in all such cases, shall withhold such warrant, and commit the defaulter to the common gaol, or some house of correction within his or their jurisdiction, there to remain without bail for any time not exceeding three months, such commitment to be in the form or to the effect of the form in the schedule to this act annexed (*o*).

On payment of the sum awarded, with costs, party discharged.

By sect. 26 it is enacted, that where any person shall be committed to prison for refusing or delaying to fulfil an award as aforesaid, and such person shall at any time during the period of his or her imprisonment, pay to the governor or keeper of the prison the full amount of the sum awarded with all reasonable expenses incurred through such refusal or delay, it shall be lawful for such governor or keeper of such prison, and he is hereby required, forthwith to discharge such person from his custody.

Form of warrant of commitment.

27. That the justice or justices by whom any person or persons shall be committed to prison for not appearing as a witness or not submitting to be examined, shall cause the warrant or order for such commitment to be drawn up in the form or to the effect set forth in the schedule to the act.

No appeal on certiorari.

28. That no appeal or certiorari shall lie against any proceedings under this act.

Want of form.

29. That no proceedings under this act shall be invalid for want of form.

Table of fees.

Section 30 provides a table of fees to be taken for proceedings under the act (*p*), and enacts that a table of fees signed by the clerk to the justices shall be hung up in every place where any general or quarter sessions, or petty or other sessions of the peace shall be held.

Costs and expenses how to be settled.

Section 31 enacts, that all costs, time and expenses attending the application to justices to be made under this act and of the arbitration pursuant thereon, shall be settled by the arbitrators or arbitrator by whom such dispute shall be settled, and where the same shall be determined by any justice of the peace, pursuant to this act, then the costs, time and expenses aforesaid shall be settled by such justice; and where the arbitrators appointed as aforesaid cannot agree as to the costs, time and expenses to be allowed, the same shall be settled by the justice or justices of the peace by whom the said arbitrators were named, and in case of his absence or indisposition, by any justice of the peace for the same county, stewartry, riding, division, barony,

(*o*) See the form in the Appendix.

(*p*) The following is the table of fees:—*To the clerk of the justice or justices*—for each summons, two pence; for every oath or affirmation, three pence; for drawing and entering the order, four pence; for every warrant, six pence. *To the constable or other peace officer*—for service of summons or order, four pence; for executing warrant of distress and sale of goods, one shilling; for custody of goods distrained, per diem, three pence; for every mile he shall travel, three pence; for every caption, six pence.

city, burgh, liberty, town or place nearest to the place at which the arbitrators met to settle the dispute: provided always, that no master manufacturer, his foreman or agent, shall in any case be allowed for costs, time or expenses by the said justice or justices, unless it shall appear to him or them that the proceedings of the workmen were vexatious and oppressive. 5 Geo. 4. c. 96.

32. Provided that every agreement, submission, award, ticket, matter or thing, under and by virtue of this act, or relating to any other mode of arbitration as aforesaid, shall and may be drawn up and written upon unstamped paper. Proceedings exempt from stamp duty.

33. Provided also, that no action shall be brought against any arbitrator, justice of the peace, constable, headborough or other officer, or against any other person or persons whomsoever for any matter or thing whatsoever done or committed under or by virtue or in the execution of this act, unless such action shall be brought within six calendar months next after the doing or committing of such matter or thing. Limitation of actions for executing act.

34. Provided also, that if any action or suit shall hereafter be commenced or prosecuted against any person or persons for anything done under, by virtue or in the execution of this act (*q*), such person or persons may plead the general issue, and give this act and the special matter in evidence, and if the plaintiff shall become nonsuited, or suffer discontinuance or forbear further prosecution, or if judgment shall be given for the defendant or defendants, such defendant or defendants shall recover his, her or their full costs, and for which he, she or they shall have like remedy as in cases where costs by law are given to defendants. In actions for executing act. General issue. Costs.

35. Provided always, that nothing in this act contained shall extend or be construed to extend to repeal, abridge, annul or make void any of the clauses, provisions, remedies or powers contained in any law or statute now in force and not repealed by this act. Proviso for acts not hereby repealed.

(*q*) Vide *ante*, p. 215, note (*u*).

CHAPTER X.

COMBINATION AMONGST MASTERS AND WORKMEN.

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THE STATUTE 6 GEO. 4, c. 129.

A GREAT variety of statutes formerly existed relative to the combination of workmen. Those statutes, however, were all repealed by the 5 Geo. 4, c. 95, which substituted other provisions in lieu thereof, "for the purpose of protecting the free employment of capital and labour, and for punishing combinations interfering with such freedom by means of violence, threats or intimidation." The provisions of that statute not being found effectual, another act was passed in the following year—6 Geo. 4, c. 129—which now regulates the law upon the subject.

5 Geo. 4, c. 95 repealed;

and 6 Geo. 4, c. 129 substituted.

Sect. 1. Sect. 1, 6 Geo. 4. c. 129, recites 5 Geo. 4, c. 95, and that it had not been found effectual, and further that "such combinations are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them," and that "it is expedient to make further provision as well for the security and personal freedom of individual workmen in the disposal of their skill and labour, as for the security of the property and persons of masters and employers, and for that purpose to repeal the said act and to enact other provisions and regulations in lieu thereof;" and then repeals 5 Geo. 4, c. 95.

Sect. 2. By sect. 2 a large number of previous acts are also repealed.

Sect. 3. Compelling journeymen

By sect. 3 it is enacted, that if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing (*a*) another, force or en-

(*a*) By 22 Vict. c. 34, s. 1, after reciting 6 Geo. 4, c. 129, it is enacted, "That no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen, or other person or persons for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably and in a reasonable manner and without threat or intimidation, direct or indirect to persuade others to cease or abstain from work in order to obtain the rate of wages, or the altered hours of labour so fixed or agreed upon, or to be agreed upon, shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said act, and shall not

deavour to force any journeyman, manufacturer, workman or other person hired or employed in any manufacture, trade or business, to depart from his hiring, employment or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman or other person not being hired or employed from hiring himself to, or from accepting work or employment from, any person or persons, or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting or carrying on such manufacture, trade or business, or to limit the number of his apprentices, or the number or the description of his journeymen, workmen or servants, every person so offending, or aiding, abetting or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months (*b*).

6 Geo. 4, c. 129.
6 Geo. 4, c. 129.
to leave employment or to return work unfinished;
preventing hiring themselves;
compelling them to belong to clubs &c.;
or to pay fines;
or forcing masters to alter mode of carrying on business.
Punishment.

4. Provided always, that this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand

Proviso for meetings for settling rates of wages *to be received*, or hours of work to be employed, by the persons meeting.

therefore be subject or liable to any prosecution or indictment for conspiracy: Provided always, that nothing herein contained shall authorize any workman to break or depart from any contract, or authorize any attempt to induce any workman to break or depart from any contract."

(*b*) A conviction by a metropolitan police magistrate under this section is sufficient, if he follows the words of the act. See 2 & 3 Vict. c. 71, s. 48; *Ex parte Perham*, 29 L. J., M. C. 33. Neither conviction nor information need allege that the threats were to any particular person. *Ib.*

6 Geo. 4, c. 129.

for his or their work, or the hours of time for which he or they will work in any manufacture, trade or business, and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

Proviso for meetings for rates of wages, &c., *to be paid* by masters to journeymen, &c.

5. Provided also, that this act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen or servants for their work, or the hours of time of working in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen or servants for their work, or the hours or time of working in any manufacture, trade or business, and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

Offenders compelled to give evidence.

By sect. 6 it is enacted, that all and every persons and person who shall or may offend against this act shall and may equally with all other persons be called upon and compelled to give his or her testimony and evidence as a witness or witnesses on behalf of his majesty, or of the prosecutor or informer, upon any information to be made or exhibited under this act, against any other person or persons not being such witness or witnesses

Indemnified.

as aforesaid, and that in all such cases every person, having given his or her testimony or evidence as aforesaid, shall be and is hereby indemnified of, from and against any information to be laid, or prosecution to be commenced, against him or her for having offended in the matter wherein or relative to which he, she or they shall have given testimony or evidence as aforesaid.

Justices may summon offenders.

7. And for the more effectually enforcing and carrying into execution the provisions of this act, it is enacted, that on complaint and information on oath before any one or more justice or justices of the peace of any offence having been committed against this act within his or their respective jurisdictions, and within six calendar months before such complaint or information shall be made, such justice or justices are hereby authorized and required to summon the person or persons charged with being an offender or offenders against this act to appear before any two (*c*) such justices at a certain time or place to be specified; and if any person or persons so summoned shall not appear according to such summons, then such justices (proof on oath having been first made before them of the due service of such

Not appearing warrants may be issued;

(*c*) Or *one* metropolitan police magistrate, see 2 & 3 Vict. c. 71, s. 14; see *R.* v. *St. George, Bloomsbury*, 20 L. J., M. C. 200, or two other justices having jurisdiction within the district, 3 & 4 Vict. c. 84, s. 6; and see 11 & 12 Vict. c. 43, s. 33.

summons upon such person or persons, by delivering the same to him or them personally, or leaving the same at his or their usual place of abode, provided the same shall be so left twenty-four hours at the least before the time which shall be appointed to attend the said justices upon such summons) shall make and issue their warrant or warrants for apprehending the person or persons so summoned and not appearing as aforesaid, and bringing him or them before such justices, or it shall be lawful for such justices, if they shall think fit, without issuing any previous summons, and instead of issuing the same upon such complaint and information as aforesaid, to make and issue their warrant or warrants for apprehending the person or persons by such information charged to have offended against this act, and bringing him or them before such justices, and upon the person or persons complained against appearing upon such summons, or being brought by virtue of such warrant or warrants before such justices, or upon proof on oath of such person or persons absconding, so that such warrant or warrants cannot be executed, then such justices shall and they are hereby authorized and required forthwith to make inquiry touching the matters complained of, and to examine into the same by the oath or oaths of any one or more credible person or persons as shall be requisite, and to hear and determine the matter of every such complaint, and upon confession by the party, or proof by one or more credible witness or witnesses upon oath, to convict or acquit the party or parties against whom complaint shall have been made as aforesaid.

6 Geo. 4, c. 129.

or warrants may be issued without summons.

On their appearance or proof (on oath) of absconding.

Proceedings.

8. That it shall be lawful for the justices of the peace before whom any such complaint and information shall be made as aforesaid, and they are hereby authorized and required at the request in writing of any of the parties, to issue his or their summons to any witness or witnesses to appear and give evidence before such justices at the time and place appointed for hearing and determining such complaint, and which time and place shall be specified in such summons, and if any person or persons so summoned to appear as a witness or witnesses as aforesaid shall not appear before such justices at the time and place specified in such summons; or offer some reasonable excuse for the default, or, appearing according to such summons, shall not submit to be examined as a witness or witnesses, and give his or their evidence before such justices touching the matter of such complaint, then and in every such case it shall be lawful for such justices, and they are hereby authorized (proof on oath in the case of any person not appearing according to such summons having been first made before such justice of the peace of the due service of such summons on every such person, by delivering the same to him or her, or by leaving the same twenty-four hours before the time appointed for such person to appear before such justices at the usual place of abode of such person) by warrant under the hands of such justices, to commit such person or persons so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of such justices, there to remain without bail or main-

Justices may summon witnesses.

Non-appearance, &c.

Proceedings.

Punishment.

6 Geo. 4, c. 129.

prize for three calendar months, or until such person or persons shall submit to be examined and give evidence before such justices as aforesaid (*a*).

Form of convictions, &c.

9. That the justices before whom any person or persons shall be convicted of any offence against this act, or by whom any person shall be committed to prison for not appearing as a witness or not submitting to be examined, shall cause all such convictions and the warrants or orders for such commitments to be drawn up in the form (*e*) or to the effect set forth in the schedule to this act annexed.

Convictions to be transmitted to next general or quarter sessions to be filed.

10. That the justices before whom any such conviction shall be had shall cause the same (drawn up in the form or to the effect hereinbefore directed) to be fairly written on parchment and transmitted to the next general sessions or general quarter sessions of the peace, to be holden for the county, riding, division, city, liberty, town or place wherein such conviction was had, to be filed amongst the records of the said general sessions or general quarter sessions, and in case any person or persons shall appeal in manner hereinafter mentioned from the judgment of the said justices to the said general sessions or general quarter sessions, the justices in such general sessions or general quarter sessions are hereby required, upon receiving such conviction, to proceed to the hearing and determination of the matter of the said appeal according to the directions of this act.

Proceedings under this act in Scotland.

11. Provided always, that in Scotland all prosecutions under this act may be insisted on at the instance of the public prosecutor, and may be judged of either by two justices of the peace, or by the sheriff of the county within which the offence may have been committed.

Appeal to general or quarter sessions.

12. Provided always, that if any person convicted of any offence or offences punishable by this act shall think himself or herself aggrieved by the judgment of such justices before whom he or she shall have been convicted, such person shall have liberty to appeal (*f*) from every such conviction to the next court of general sessions or general quarter sessions of the peace, which shall be held for the county, riding, division, city, liberty, town or place wherein such offence was committed, and that

(*d*) Upon an indictment for conspiracy to commit the acts prohibited by this statute the penalties of a misdemeanor, fine and imprisonment, would attach; and the court would not be confined to awarding three months' imprisonment as provided by this section, *R.* v. *Rowlands*, 17 Q. B. 671; *S. C.* 2 Den. C. C. 364.

(*e*) See form in the Appendix. And see also the forms given in the schedule to 11 & 12 Vict. c. 43, s. 32; the use of which, however, is not obligatory.

(*f*) Notice of appeal should be given to the other side. Where sessions dismissed an appeal because notice pursuant to a rule of sessions had not been given, the Court of Queen's Bench held that they ought to have entered and respited the appeal, and were not justified in refusing to hear it; and awarded a peremptory mandamus to enter continuances and hear the appeal, and the prisoner was liberated in the meantime on his own recognizances, *Re Blues*, 5 E. & B. 291; *S. C.* 24, L. J., M. C. 138.

the execution of every judgment so appealed from shall be suspended in case the person so convicted shall immediately (*g*) enter into recognizances before such justices (which they are hereby authorized and required to take) himself in the penal sum of ten pounds with two sufficient sureties in the penal sum of ten pounds of lawful money of Great Britain, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the said next general sessions or general quarter sessions, and to pay such costs as the said court shall award on such occasion, and the justices in the said next court of general sessions or general quarter sessions are hereby authorized and required to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party, which decision shall be final; and if upon hearing the said appeal the judgment of the justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall immediately be committed by the said court to the common gaol or house of correction, without bail or mainprize, according to such conviction, and for the space of time therein mentioned.

6 Geo. 4, c. 129. Recognizance. Security to prosecutor. Costs. Decision final. Imprisonment.

13. Provided also, that no justice of the peace, being also a master in the particular trade or manufacture in or concerning which any offence is charged to have been committed under this act, shall act as such justice under this act.

No master to act as justice.

OBSERVATIONS ON 6 GEO. 4, C. 129.

Since the passing of this Act of Parliament, it is perfectly clear that a mere combination either of masters for the purpose of lowering wages (*h*), or of workmen for the purpose of raising them (*i*), is quite legal, and so long as such persons content themselves with merely combining to effect the object they have in view, they will be guilty of no offence. But if, in order more effectually to attain their object, whether of lowering or raising wages, they proceed to use violence, threats, intimida-

Mere combination not illegal. When it becomes illegal.

(*g*) In *R.* v. *Aston*, 1 L. M. & P. 491, Wightman, J., held that this word "immediately" here means "promptly and expeditiously," having regard to all the circumstances of the particular case. In that case the prisoner was convicted on Thursday at Tunstall, in Staffordshire, and committed to Stafford Gaol, though defended by an attorney, who left the court before sentence was pronounced. On the Saturday following another attorney, who lived at Manchester, was consulted on his behalf, and that attorney on the Monday applied to the justices (who did not sit on Saturday) to be allowed to enter into recognizances as required by the act. After time taken to consider the matter, they refused the application; but Wightman, J., thought it ought to have been granted; and made absolute a rule (which had been granted under 11 & 12 Vict. c. 44, s. 5), ordering the recognizances to be taken. And see *Re Blues*, 5 E. & B. 291.

(*h*) See sect. 5.

(*i*) See sect. 4.

tion, molestation or obstruction (*k*), with a view to *force* others to adopt their views, they will be guilty of an offence against this Act of Parliament (*l*); and, as we shall presently see, may also render themselves liable to an indictment for conspiracy.

Charge of Tindal, C. J., to the grand jury at Stafford, 1842.

That the above is the effect of the stat. of Geo. 4, will be perceived from the following observations of Tindal, C. J., who, in charging the grand jury at the Stafford Special Commission, in 1842 (*m*), whilst alluding to the various charges which would be brought before them, arising out of combinations of workmen, observed: "If the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent (if indeed it is to be called by that name) is no more than is recognized as legal by the stat. 6 Geo. 4; by which statute, also, exactly the same right of combination, to the same extent and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given – it was probably thought by the Legislature, that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way whose pretensions were not founded in reason and justice – the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour if they were discontented with the price they received for it, they assumed the power of interfering with the rights which others possessed of exercising their discretion upon the same point;

(*k*) As to the meaning of these words, see 22 Vict. c. 34, *ante*, p. 352, note.

(*l*) See sect. 3; *R.* v. *Rowlands*, 17 Q. B. 671; *S. C.* 2 Den. C. C. 364 Administering an oath not to work under certain prices and to keep the secrets of a lodge, is administering an unlawful oath within the statutes 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo. 3, c. 19; not as has been ignorantly supposed because it has reference to any matter respecting wages, but on the ground that every association of that kind bound together by an oath not to disclose the proceedings of that society is for that reason, and not for the other, an unlawful combination within the meaning of the statutes, *R.* v. *Ball*, 6 C. & P. 563; *R.* v. *Lovelass*, 6 C. & P. 596; *S. C.* 1 M. & Rob. 349; *R.* v. *Dixon*, 6 C. & P. 601.

(*m*) See Carr. & M. 662, note. It is thought desirable to give this and the following extract, as the law as to combination is *in practice* not well known or understood; at least by workmen.

and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence, and by threats and intimidation, to compel others who were perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party, than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. *If there is one right which beyond all others the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow-workmen;* yet, strange to say, this very right which the discontented workman claims for himself to it fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows who differ in opinion from himself. It is unnecessary to say that a course of proceeding so utterly unreasonable in itself, so injurious to society, so detrimental to the interests of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment."

R. v. Rowlands.

And similar principles were also laid down by Patteson, J., in passing sentence upon some prisoners who had been convicted upon an indictment under the stat. of Geo. 4 (*n*). "The object of the Legislature," said he, "was, that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves what wages they would pay. In like manner, the workmen were at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstances that they were in the employ of one or other of the masters. The intention of the Legislature was to make them quite free, but seeing that intimidation might be used to carry out such agreements, it was enacted by 6 Geo. 4, c. 129, s. 3 (*o*), that (the learned judge here read that section, and added) *the offence did not consist in the combination to* raise their wages, *but in the use of threats, intimidation, molestation and obstruction.*"

CONSPIRACIES AMONGST MASTERS AND WORKMEN.

Conspiracy to dictate to master what workmen he shall employ.

Since the above-mentioned stat. 6 Geo. 4, c. 129, it has also been held that a combination (*p*) of workmen for the purpose of dictating to masters what workmen they shall employ is indictable (*q*). And an indictment for conspiring to prevent *the workmen* of J. G. from continuing to work was held to be supported by evidence of a conspiracy to procure the discharge of

R. v. Bykerdike.

(*n*) *R.* v. *Rowlands*, Q. B., Mich. Term, 1851; 17 Q. B. 671; *S. C.* 5 Cox, C. C. 436.

(*o*) See the section, *ante*, p. 352.

(*p*) That a combination bond is illegal and void, see *Hilton* v. *Eckersley*, 6 E. & B. 47; *S. C.* 24 L. J., Q. B. 353, *ante*, p. 58.

(*q*) *R.* v. *Bykerdike*, 1 Moo. & Rob. 179.

any of the workmen, as the indictment did not necessarily lay the intent as to *all* the workmen (*r*).

Club fining men who worked for obnoxious master.

R. v. *Hewitt.*

In the case of *R.* v. *Hewitt* (*s*) where it appeared that a club of workmen had been formed, and was empowered to inflict fines upon persons who worked for obnoxious masters, and that a person so fined refused to pay, whereupon his fellow-workmen would not work with him, and by that means compelled his master to dismiss him, Lord Campbell, C. J., held such conduct of the men to be illegal.

Conspiracy to reduce or increase rate of wages.

Moreover, if either masters or servants conspire to effect a reduction or increase of wages by *the use of violence, threats, intimidation or other unlawful means*, they will be guilty of an illegal act, and may be indicted for such conspiracy (*t*). It is not, however, thought necessary further to advert in this place to the law applicable to the crime of conspiracy, as a discussion of it would lead us beyond the proper limits of this work (*u*). It may, however, perhaps with propriety, be here stated that a conspiracy has been defined to be "an agreement for an unlawful purpose, or to effect a lawful purpose by unlawful means" (*x*). But Lord Denman, C. J., in one case (*y*), said he thought the antithesis not very correct; and, in another (*z*), said the words "at least" should accompany the definition.

Discontented workmen riotously "beginning to demolish" master's house.

R. v. *Batt.*

Where a party of coal-whippers having a feeling of ill-will to a coal-lumper who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brickbats, &c., and broke windows, and partitions, and part of a wall, and continued after his escape throwing stones at the house till they were compelled to desist by the threats of the police, it was held by Gurney, B., that they might be convicted of beginning to demolish under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and though they had not any ill-will against the owner of the house personally (*a*).

(*r*) *Ibid.*; and see *R.* v. *Ferguson*, 2 Stark. 489, where an indictment against workmen for conspiring to prevent their masters from taking *any* apprentices, was held to be supported by proof of a conspiracy to prevent their taking *more than a certain number*, in proportion to the number of journeymen employed.

(*s*) 5 Cox, Crim. Cas. 162.

(*t*) See *R.* v. *Duffield*, 5 Cox, Cr. C. 404; *R.* v. *Rowlands*, *ibid.* 436.

(*u*) See further on this subject 2 Russ. on Crimes, by Greaves, bk. 2, ch. 2, p. 674; and *R.* v. *Kenrick*, 5 Q. B. 49; *R.* v. *Button*, 11 Q. B. 929, where other authorities upon the subject may also be found. See also a learned note to Mr. Justice Coleridge's edition of Blackst. Comm. vol. iv. p. 136, where he explains the confusion which has arisen in many cases from the fallacy of separating the *means* from the *end*; and considering that any means could possibly be lawful, of which the end was unlawful, or on the other hand any end lawful, the means to which were unlawful.

(*x*) *R.* v. *Jones*, 4 B. & Ad. 349; *R.* v. *Seward*, 1 A. & E. 713; *O'Connell* v. *R.*, 11 Cl. & F. 233.

(*y*) *R.* v. *Peck*, 9 A. & E. 690.

(*z*) *R.* v. *King*, 7 Q. B. 788.

(*a*) *R.* v. *Batt*, 6 C. & P. 329.

CHAPTER XI.

LEGACIES TO SERVANTS.

Who entitled to legacies as "servants"

It is thought convenient to collect into a separate chapter the various decisions upon this subject, as the question, Whether particular individuals are entitled to legacies left to a class of persons as "servants," frequently arises; and the answer to it rather depends upon the words of the will and the intention of the testator in each case, than upon the strict legal construction of the contract into which he has entered with the persons claiming the legacy. For it by no means follows that every person with whom a testator had entered into a contract of hiring and service, was an object of his testamentary bounty; although, in many cases, a clue to his intention may be found by ascertaining the exact nature of such contracts. For similar reasons no rule can be laid down which will be applicable to all cases. Each case must depend upon its own particular circumstances. It is, however, of course, necessary that a person claiming to be entitled to a legacy left to each one of a class of persons, should be one of that class to whom the legacy is left—that a person claiming a legacy as a servant should be a servant—otherwise he cannot be entitled to it. It has, therefore, been held (*a*) that a person who was not obliged to give up his *whole time* to his master, although in some sense he might be called a servant, was yet not entitled to a legacy left to servants.

depends on intention of the testator.

But servant must serve testator *exclusively;*

Thus where (*b*) the Duke of Bolton by his will devised "unto such of my servants as shall be living with me at the time of my death one year's wages:" The Lord Keeper said, "stewards of courts, and such who are not obliged to spend their *whole time* with their master, but may also serve any other master, are not servants within the intention of the will, but I will not narrow it to such servants only that lived in the testator's house or had diet from him."

Townshend v. *Windham.*

but need not live in his house or be fed by him.

Upon similar principles it has been held that a servant to be entitled to a legacy left to "servants," must not be subject to the orders of any other person than the testator. That is, that a person serving the testator under a contract made by the testator with that person's master, does not come within the class of persons contemplated by the will, although the testator might in some sense be considered his *dominus pro tempore.*

So, he must not be subject to orders of any one but testator.

Thus where (*c*) a testator, after bequeathing legacies to two

Coachman

(*a*) This is in accordance with the decisions on the law of settlement, *ante*, p. 49.

(*b*) *Townshend* v. *Windham*, 2 Vern. 546.

(*c*) *Chilcot* v. *Bromley*, 12 Ves. 114; and see *Quarman* v. *Burnett*, 6 M. & W. 499, *ante*, p. 199.

supplied to testator by job master, with carriage and horses, is not the testator's servant.

Chilcot v. *Bromley.*

of his servants by name, if in his service at the time of his decease, gave and bequeathed unto all his "other servants" who should be living with him at the time of his decease 50*l.* each, and 10*l.* each for mourning; and by a codicil revoked the legacies of 50*l.* and 10*l.* for mourning to his other servants not particularly named, and made the following bequest: "To all my other servants in lieu thereof the sum of 500*l.* each, and 20*l.* each for mourning:" Sir W. Grant, M. R., held that a coachman supplied, in the course of business, with a carriage and horses hired by the year from a job-master, was not entitled to the legacy as a servant within the intent and meaning of the will. The coachman, in that case, did not board or lodge in the testator's house, but received from him 12*s.* a week as board wages, and a livery with the other male servants, the job-master also paying him 9*s.* a week; but the coachman served no other person than the testator, and was returned by him as his coachman under the act imposing a duty on male servants. However, Sir W. Grant observed, truly, that the coachman was merely the *subject* of the contract, which was with the job-master, not a *party* to it.

Aliter, coachman hired by testator, although job-master paid his wages and found livery.

Howard v. *Wilson.*

And in *Howard* v. *Wilson* (*d*), in a suit of subtraction of legacy, a coachman, a married man, *originally hired by*, and who had lived five years with a testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages, waiting sometimes at table, and *remaining with her though she changed her job-master*, was held entitled under a bequest "to each of my servants living with me at the time of my death 10*l.*;" *although* the testatrix paid a *job-master* 200*l.* a year, out of which he *paid* the coachman *wages* and board wages (except 3*s.* a week extra in the country), and found him in liveries; Sir J. Nicholl distinguishing the case from *Chilcot* v. *Bromley* (*e*).

Bulling v. *Ellice.*

Farm bailiff held to be a servant.

The late Earl of Leicester by his will (*f*) gave "one year's wages in advance to each of my servants in my service at my death, who shall have lived with me five years or upwards, and one-half of a year's wages to each of my other servants in my service at my death; the said several legacies to my said servants to be in addition to whatever sum may be due to them respectively for wages up to my death; and also an additional sum of 10*l.* to each of my upper servants and of 5*l.* to each of my under servants respectively for mourning. And I direct that each of the said legacies expressly given for mourning, and each of the said legacies to my said servants shall be paid within one calendar month next after my death." Knight Bruce, V. C., held it to be perfectly plain that a farm-bailiff, who had lived with the Earl twenty-eight years, at 350*l.* a year, living on the home farm within the park, rent free, the Earl paying all rates and taxes, and who was allowed keep for a cow and a horse, and to take pupils to instruct in agriculture, was a servant within the meaning of the will, and clearly entitled to his

(*d*) 4 Hagg. 107.
(*e*) *Ubi supra.*
(*f*) 9 Jurist, 936.

year's wages of 350*l.* (*g*), and interest at four per cent. from one month from the testator's decease, the time when the legacy was directed by the will to be paid.

Where (*h*) the Earl of A. by his will, after bequeathing legacies to several servants by name, bequeathed "to each person as a servant in my *domestic establishment* at the time of my decease a year's wages beyond what shall be due to him or her for wages:" Knight Bruce, V. C., held that a head gardener at weekly wages, who had formerly resided in a garden-house in the middle of the garden (which had been furnished by the Earl, and all the expenses of which were defrayed by him, and the domestic work of which was performed by his domestic servants and a charwoman paid by him), but, on the Earl wishing to pull down the garden-house, had removed to another cottage belonging to the Earl in an adjoining village, and who was allowed milk and firewood, was entitled to the legacy. But Lord Truro, on appeal, reversed that decision, considering that the testator had in view the distinction between *indoor* and *outdoor* servants when he used the term "servants in my domestic establishment."

Ogle v. *Morgan.*

"Servants on domestic establishment" only applies to indoor servants.

Moreover, to entitle a servant to a legacy of a year's wages it has been held that he must have been a *yearly* servant, and a servant who has been paid *weekly* wages is not entitled. Thus where a will contained the following words, "I give to each of my servants *one year's* wages over and above what may be due to them at the time of my decease," a question was made whether a person who had worked in the testator's garden, under his gardener, for several years, at *weekly wages*, and a boy who had served the testator for some time as a cowboy, at *weekly wages*, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the will to a year's wages: but Sir J. Leach, M. R., was of opinion that these persons were not servants in the sense in which the testator had used the expression. In speaking of a year's wages the testator plainly used that expression with reference to family servants usually hired by the year (*i*).

Servant must be a *yearly* servant.

Booth v. *Dean.*

Servant at *weekly* wages not entitled to legacy of *year's* wages.

And so where (*k*) a testator by his will gave "to each of his servants living with him at his decease, and who had lived with him three years," a legacy of one year's wages, Sir G. Turner, V. C., held, that a head gardener who at the time of the death of the testator lived in a cottage of the testator in the grounds, free of rent, and was employed at 17*s. a week*, was not entitled to the legacy; as although clearly a servant, and not to be excluded on the ground that he was not living in the same house with the testator, yet the bequest only applied to servants hired *by the year*. He could not impute to the testator that he meant by a year's wages, the aggregate amount of fifty-two weeks' wages. And as the evidence on the part of the plaintiff failed

Blackwell v. *Pennant.*

Nor gardener at *weekly* wages.

(*g*) The 10*l.* for mourning had been paid.

(*h*) *Ogle* v. *Morgan*, 19 L. J., Ch. Cas. 531; reversed by Lord Truro, L. C., 1 De G. M. N. & G. 359.

(*i*) *Booth* v. *Dean*, 1 Myl. & K. 560. But see *Thrupp* v. *Collett*, *post*, p. 364.

(*k*) *Blackwell* v. *Pennant*, 9 Hare, 551.

to make out that he was a *yearly* servant, his claim was dismissed with costs.

Breslin v. *Waldron.*

Upon the authority of these cases, a similar decision was made in Ireland, in a case (*l*) in which a testator bequeathed "unto each and every of the servants, male and female, who shall respectively have been living in my service for the space of six calendar months immediately previous to my decease, the amount of one year's standing wages over and above any yearly salary or wages I may owe them respectively at my decease." A person who stated that he was "a servant in the employment of the testator as a gardener for a period of nearly eleven years prior to his decease, and was hired by the testator as such servant on the 17th of March, 1841, at wages or remuneration equivalent to the sum of 52*l.* a year, payable by a weekly allowance of 12*s.* 6*d.* in money, and by means of a house rent free, and a certain allowance of milk and coals yearly; all of which money and other wages and allowances were equivalent in value to the said yearly salary of 52*l.* a year," was held by Brady, L. C., not entitled to any legacy under the above bequest, as the terms of the bequest made it essential that the servant should have been engaged on a yearly hiring and wages, and it could not be inferred from the petitioner's statement that there was a yearly hiring, or a hiring at yearly wages. But he (the L. C.) thought it certainly not of any importance that the petitioner did not live in the house, nor that his wages were paid weekly or at irregular intervals, if they were in truth yearly wages.

Thrupp v. *Collett.*

However, where (*m*) a testator, among other pecuniary legacies, gave to his executors the sum of 1,000*l.* to be equally divided between all the servants in his service at the time of his decease (except as in his will mentioned), it was held by Sir J. Romilly, M. R., that a head gardener and under gardener, at weekly wages, who lived at their own houses, adjacent to that of the testator, and were occupied in their employment of gardeners the whole of the working days, and occasionally on Sundays, to feed the cattle and attend to the garden, and had no employment from any other person during their engagement with the testator, were servants within the meaning of the will. "The case of *Townshend* v. *Windham*(*n*)," said the M. R., "lays down that the mere fact of responsibility is not a ground upon which the court ought to proceed, and it would appear to me a very strange decision to hold that a person is not a servant because he does not live in the house but in a cottage belonging to his master. It is a common thing to pay gardeners by the week. The gardener was in the employment of the testator for upwards of a year, and during the whole of that time was engaged in the management of the garden. I can see no definition of 'servants' which would exclude the gardener. The same observation applies to the under gardener, and he also is entitled as one of the servants of the testator."

(*l*) *Breslin* v. *Waldron*, 4 Ir. Ch. C. 333 (1855).

(*m*) *Thrupp* v. *Collett*, 5 Jurist, N.S. 111; *S. C.* 26 Beav. 147.

(*n*) 2 Vern. 546, *supra*, p. 361.

Service must continue to death of testator.

The servant also must, generally speaking, continue in the service of the testator to the time of his death.

Jones v. *Henley.*

Sir Robert Henley, by will (*o*), gave 100*l.* apiece to all his servants. The court declared that none but such as were his servants before the making of the will (*p*), and did so continue to be servants to him until the time of his death, could have any pretence to the legacy: and such only as were his menial servants, and lived all along in the house with him from the date of the will until his death, and no others.

Herbert v. *Reid.*

Quitting house but not service.

But where (*q*) a testator bequeathed a legacy to Jane H., "if in his service at the time of his decease," and it appeared that Jane H. had quitted his house a few days before his death, Lord Eldon held, that parol evidence was admissible to show that though she had quitted his *house*, she continued and was considered by him as still in his *service:* and upon that evidence the legacy was established.

Parker v. *Marchant.*

Servant who lived with testator at date of will but had left long before his death, held entitled, under bequest to "other servants."

And in the subsequent case of *Parker* v. *Marchant* (*r*), where a testator had several servants, and by a codicil to his will bequeathed to some of them by name legacies of 1,000*l.* each, and then gave "to the other servants 500*l.* each;" it was held by Lord Lyndhurst, L. C. (affirming the decision of Knight Bruce, V. C.), that A. R., a female servant who was in the testator's service at the date of the codicil, though for ten weeks only, and quitted it three years and a half before his death, was entitled to a legacy of 500*l.*, considering that the case of *Jones* v. *Henley* (*s*) did not apply. And his lordship said, "The testator had several servants, some of whom had lived in his service for many years, as he states in his codicil. The others lived with him for a shorter period of time. He distinguishes between them. He gives to three of them by name, who had lived in his service for many years, 1,000*l.* each, and he then expresses himself thus, 'to the other servants 500*l.* each.' What is meant by the other servants? The rest. After taking out of the whole class the three individuals who are named, Mrs. D. and the two others, to whom he gives 1,000*l.* each, he then gives 500*l.* to the remainder. It appears to me as if he had named them, and as he annexes no condition to the gift, I am of opinion that A. R. is entitled, on the construction of this codicil, to the legacy of 500*l.*"

Promissory notes left by master payable to his servant, but not delivered in master's

Where a man on his death left among his papers two letters sealed and directed "for Sarah Gough, my late servant," one of which contained a promissory note for 400*l.*, and the letter stated that it was "in consideration of her long and faithful services" (she having been his housekeeper, but having left on

(*o*) *Jones* v. *Henley*, 2 Chanc. Rep. 361.

(*p*) The question does not appear to have been raised in any subsequent cases, whether it was necessary that the servant should have been in the service of the testator *at the date of his will*, as well as at the time of his death. See *Parker* v. *Marchant*, *infra*.

(*q*) *Herbert* v. *Reid*, 16 Ves. 481.

(*r*) 6 Jurist, 292; *S. C.* 1 Y. & C., N. S. 290; *S. C.* on appeal, 7 Jur. 457 (the point in the text is not noticed in the report, 2 Cr. & Ph.)

(*s*) *Ubi supra.*

lifetime, void.

Gough v. *Findon.*

having a child by him), and that his executors would pay her the amount of the note; and the other letter was similarly addressed, and inclosed a note for 200*l.* and in the letter there was the following passage:—"In addition to any sum I owe you, I enclose you 200*l.* as a mark of my respect," and there was also a recommendation that the money should be invested for the benefit of the child; it was held that the notes were void as notes for want of delivery in the maker's lifetime, and therefore the executors were not liable upon them; and they were also void as testamentary dispositions, for non-compliance with the Wills Act (*t*).

Trimmer v. *Danby.*

And a similar decision was made by Kindersley, V. C., in a case (*u*) in which a housekeeper who had been forty years in the testator's service, and to whom an annuity was bequeathed by his will, claimed some Austrian bonds which were in a box belonging to the testator, of which, and the key, she had the custody. The bonds were rolled up in packets, and one containing ten had this indorsement, signed by the testator, "The first five numbers of the Austrian Bonds belong to and are Hannah Danby's property. Signed, J. M. W. Turner." It was held that as there had been no actual transfer or delivery of the five bonds, they still formed part of the testator's assets, for although H. D. had the *custody* she had not the *possession* of the bonds.

How far legacy is a satisfaction of debt for wages.

When a legacy is left by a master to his servant, it will, sometimes, be considered as a satisfaction, either in the whole or in part, of any wages due at the time of the master's death, unless a contrary intention appear from the master's will (*x*). Courts of equity, however, are inclined to infer a contrary intention from slight circumstances. Thus, in *Matthews* v. *Matthews* (*y*), Sir Thomas Clarke, M.R., said he remembered a case, before Lord Hardwicke, where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed or was likely to owe; yet because the legacy was made payable *a month after* her own death, the court laid hold of that circumstance to take it out of the general rule (*z*).

Matthews v. *Matthews.*

Re Fuller.

A testator (*a*) bequeathed by will as follows:—"Likewise should my executors think proper to my man-servant whom I call Sam (the plaintiff) I give 20*l.* conditional on his continuing to conduct himself faithfully in all respects," and appointed executors. The will was made and the testator died in the

(*t*) *Gough* v. *Findon*, 21 L. J., Exc. 58; *S. C.* 7 Exc. 48; see *Hulse* v *Hulse*, 17 C. B. 711, 721.

(*u*) *Trimmer* v. *Danby*, 25 L. J., Ch. 424.

(*x*) See *Le Sage* v. *Coussmaker*, 1 Esp. 188.

(*y*) 2 Ves. sen. 636; see also *Chancey's Case*, 1 P. Wms. 408. However, in *Richardson* v. *Greese*, 3 Atk. 69, Lord Harkwicke said that legacies to servants had never been held to be in satisfaction of debts. In France legacies to servants are not considered as satisfaction for wages, Code Civ. liv. 3, tit. 2, sec. 6, 1023.

(*z*) In *Roch* v. *Callen*, 6 Hare, 531. An annuity of 20*l.* left to a servant by a codicil was held to be cumulative upon and not in substitution of a similar annuity left by the will.

(*a*) *Re Fuller*, 2 E. & B. 573.

district of the County Court of Kent. The executors renounced probate, and M. who resided in London, took out administration with the will annexed, in the Prerogative Court of Canterbury. Sam sued M. in the County Court of Kent for the 20*l.* But the Court of Queen's Bench granted a prohibition on the ground that the grant of letters of administration was part of the cause of action, and the judge of the County Court of Kent had no jurisdiction in respect of it over M. And it was doubted whether the bequest was a legacy which might be recovered in the proper county court, or a bequest in trust only to be enforced in equity. Lord Campbell thought it was a legacy which might be recovered in the county court.

Direction by testator to employ particular servant or agent.

Germane to the subject we have been treating of, and therefore proper to be introduced in this place, are the cases in which the question has arisen whether a direction or injunction in a will to employ a particular steward or agent imposes on the devisee an obligation in the nature of a trust in favour of the person so named (*b*). This question arose in the case of *Lawless* v. *Shaw* (*c*). There the testator, after devising his estates, charged with certain annuities, to his friend Shaw (then aged twenty years) for life, with remainders over in strict settlement, and directing the residue of his personal estate to be invested in the purchase of other real estates, to be settled in like manner, and after bequeathing to his friend and agent, Lawless, 100*l.* as a token of esteem, and after directing his executors to pay to his agent 150*l.*, to be distributed among the poor on his estates, declared it to be his "particular desire that his executors, whilst acting in the management of all or any of his affairs under his will, as also his friend Shaw, when he should enter into the receipt of the rents of his estates, should continue Lawless in the receipt and management thereof, and likewise should employ and retain him in the receipt, agency and management of lands to be purchased and settled in pursuance of the will, at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estates fully to his satisfaction." The testator also bequeathed to his friend and agent, Lawless, 150*l.* to purchase a monumental tablet. Soon after the testator's decease, Shaw dismissed Lawless from his office as land agent, but without impeaching his character or capacity. Lawless filed a bill in Chancery against Shaw, claiming to be reinstated, which was dismissed by Lord Plunket, and his decree (though upon a rehearing reversed by his successor, Lord St. Leonards) was afterwards affirmed in the House of Lords. In delivering judgment in the House of Lords, Lord Cottenham, C., after stating that all cases upon a subject like this must depend upon the testator's intention, and that Lawless was only agent to the testator in his lifetime *during his pleasure*, and that by the terms of the will the testator desired he should continue in the agency, and that the natural presumption was that the testator wished him to continue upon the *same terms*, and showing to what absurd consequences the upholding Lawless'

Lawless v. *Shaw.*

(*b*) See generally on this subject, *Knight* v. *Knight*, 3 Beav. 148; *Green* v. *Marsden*, 1 Drew. 616.

(*c*) *Lloyd & Goold*, 154; *S. C.* in Dom. Proc. 5 Cl. & F. 129.

Lawless v. *Shaw.*

claim would lead, said, "There is, it is true, a great variety of cases in which the expression of a wish has been held to create a trust; but the rule of construction in these cases is that there should be certainty in the object and in the subject of a trust so created; that the expressions in the will should not leave the matter in a doubtful ambiguity. *Cary* v. *Cary* (*d*) has been referred to. There Lord Redesdale expressed the rule in these words, 'When a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command, and if he shows his desire, he in fact expresses his intention, provided the objects to which he refers are so defined that a court can act upon the desire so expressed.' In *Foley* v. *Parry* (*e*) the court held that a desire that a devisee in remainder should be educated and maintained from the income of the devised property created a trust in his favour. There everything concurred to show that such was the intention of the testator. In *Hibbert* v. *Hibbert* (*f*) a trust was held to be created as to a West Indian estate, and H., the person in whose favour the desire was made, was appointed consignee. But there the words were clear and express in his favour, though the estate to which they applied appeared doubtful. In *Tibbits* v. *Tibbits* (*g*) there was no doubt as to the subject matter, but still that case carried the doctrine of creation of trusts further than any which had preceded it, though, as it seems to me, not so far as the decree (of Lord St. Leonards) in the present case has carried it. It is true, that all the court requires is that the subject and object shall be defined and certain. Then what is the subject in the present case? It is the right to be employed in the receipt of the rents, and the agency and management, of the land of another person upon the usual fees. What is the necessary effect of this alleged right. It goes to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves. Then this question arises: Suppose that he parts with the estate, would it, in the hands of a purchaser, be subject to the same liability to this claim of agency on the part of Lawless? Was it the desire or the wish of the testator that it should be so? or did he merely wish that his devisee should employ a man whose conduct had given satisfaction to himself? Some cases of difficulties of another kind were put in the course of the argument. It was asked, among other things; whether, if a testator should say that he desired his son to be educated at a particular school that would create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit, not of the schoolmaster, but of the scholar. Having examined all the cases, and quite satisfied myself that there is

(*d*) 2 Sch. & Lef. 173.
(*e*) 5 Sim. 138, affirmed on appeal, 2 M. & K. 138.
(*f*) 3 Mer. 681.
(*g*) 19 Ves. 656; Jac. 317.

not a case which comes at all near the present, I mean indeed that all are against the construction contended for by the respondent, I am of opinion that the judgment pronounced by Lord Plunket was correct, and that the decree of Lord Chancellor Sugden must so far be reversed."

Auditor.

In a previous case (*h*) in which a testator devised his estates to trustees upon trust to let the same, and apply the rents in paying off certain incumbrances, and appointed A. to be *auditor* of the accounts during the execution of the trusts, and directed the trustees to pay him the usual annual remuneration; Sir L. Shadwell, V. C. held that the trustees were not justified in removing A. from the office, there being no imputation on his conduct, for that he had as much right to be auditor as any one of the devisees had to the estates.

Williams v. *Corbet.*

Where a testator (*i*), after leaving some legacies proceeded thus, "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts," Lord Langdale, M. R. thought he could not be understood to have intended to create an imperative trust.

Knight v. *Knight.*

(*h*) *Williams* v. *Corbet*, 8 Sim. 349.

(*i*) *Knight* v. *Knight*, 3 Beav. 148.

APPENDIX.

5 Eliz. c. 4(*a*).

An Act containing divers orders for Artificers, Labourers, Servants of Husbandry and Apprentices.

A repeal of so much of former statutes as concerns the hiring, keeping, departing, working or order of servants, labourers, &c., and a declaration who shall be compellable to serve in handicrafts, and who in husbandry and their several duties, &c.

Although there remain and stand in force presently a great number of acts and statutes concerning the retaining, departing, wages and orders of apprentices, servants and labourers, as well in husbandry as in divers other arts, mysteries and occupations, yet partly for the imperfection and contrariety that is found, and doth appear in sundry of the said laws, and for the variety and number of them, and chiefly for that the wages and allowances limited and rated in many of the said statutes, are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and labourers; the said laws cannot conveniently, without the great grief and burden of the poor labourer and hired man, be put in good and due execution: and as the said several acts and statutes were, at the time of the making of them, thought to be very good and beneficial for the commonwealth of this realm (as divers of them are), so if the substance of as many of the said laws as are meet to be continued shall be digested and reduced into one sole law and statute, and in the same an uniform order prescribed and limited concerning the wages and other orders for apprentices, servants and labourers, there is good hope that it will come to pass, that the same law (being duly executed) should banish idleness, advance husbandry, and yield unto the hired person, both in the time of scarcity and in the time of plenty a convenient proportion of wages.

2. Be it therefore enacted by the authority of this present parliament, that as much of all the estatutes heretofore made, and every branch of them, as touch or concern the hiring, keeping, departing, working, wages, or order of servants, workmen, artificers, apprentices and labourers, or any of them, and the penalties and forfeitures concerning the same, shall be, from and after the last day of September next ensuing, repealed and utterly void and of none effect; and that all the said statutes and every branch thereof, or any matter contained in them and not repealed by this statute, shall remain and be in full force and effect, anything in this statute to the contrary notwithstanding.

No person shall retain a servant in their sciences

3. And be it further enacted, by the authority aforesaid, that no manner of person or persons, after the aforesaid last day of September, now next ensuing, shall retain, hire, or take into service, or

(*a*) This statute is copied from Pickering's Statutes at large.

under one whole year.

cause to be retained, hired, or taken into service, nor any person shall be retained, hired, or taken into service by any means or colour to work for any less time or term than for one whole year in any of the sciences, crafts, mysteries, or arts of *clothiers, woollen cloth weavers, tuckers, fullers, clothworkers, sheremen, dyers* (*b*), hosiers, tailors, shoemakers, tanners, pewterers, bakers, brewers, glovers, cutlers, smiths, farriers, curriers, saddlers, spurriers, turners, cappers, hatmakers, or feltmakers, bowyers, fletchers, arrowheadmakers, butchers, cooks or millers.

What sort of persons are compellable to serve in any of the crafts aforesaid.

4. And be it further enacted, that every person being unmarried, and every other person being under the age of thirty years, that after the feast of Easter next shall marry, and having been brought up in any of the said arts, crafts, or sciences, or that hath used or exercised any of them by the space of three years or more, and not having lands, tenements, rents, or hereditaments copyhold or freehold of an estate of inheritance, or for term of any life or lives of the clear yearly value of forty shillings, nor being worth of his own goods the clear value of ten pounds, and so allowed by two justices of the peace of the county where he hath most commonly inhabited by the space of one whole year, and under their hands and seals, or by the mayor or other head officer of the city, borough, or town corporate where such person hath most commonly dwelt by the space of one whole year, and two aldermen or two other discreet burgesses of the same city, borough, or town corporate, if there be no aldermen, under their hands and seals, nor being retained with any person in husbandry or in any of the aforesaid arts and sciences (*b*) according to this statute, nor lawfully retained in any other art or science, nor being lawfully retained in household, or in any office with any nobleman, gentleman, or others according to the laws of this realm, nor have a convenient farm or other holding in tillage whereupon he may employ his labour, shall, during the time that he or they shall be so unmarried, or under the said age of thirty years, upon request made by any person using the art or mystery wherein the said person so required hath been exercised (as is aforesaid), be retained, and shall not refuse to serve according to the tenor of this statute upon the pain and penalty hereinafter mentioned.

No person shall put away his servant, nor shall any servant depart from his master before the end of his time.

5. And be it further enacted, that no person which shall retain any servant shall put away his or her said servant, and that no person retained according to this statute shall depart from his master, mistress, or dame before the end of his or her term, upon the pain hereafter mentioned, unless it be for some reasonable and sufficient cause or matter, to be allowed before two justices of peace, or one at the least within the said county, or before the mayor or other chief officer of the city, borough or town corporate wherein the said master, mistress or dame inhabiteth, to whom any of the parties grieved shall complain, which said justices, or justice, mayor or chief officer, shall have and take upon them or him the hearing and ordering of the matter betwixt the said master, or mistress or dame and servant according to the equity of the cause (*c*).

No servant shall depart or be put away but

6. And that no such master, mistress or dame shall put away any such servant at the end of his term, or that any such servant shall depart from his said master, mistress or dame at the end of his term

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(*b*) Sections 3 and 4 are repealed as to the trades, printed in *italics*, and dyers of wool or woollen cloth, by 49 Geo. 3, c. 109, s. 2.

(*c*) And see further, *ante*, Ch. 9, and cases there cited as to form of the order.

without one quarter's warning given before the end of his said term, either by the said master, mistress or dame or servant the one to the other, upon the pain hereafter ensuing. upon a quarter's warning.

7. And be it further enacted, by the authority aforesaid, that every person between the age of twelve years and the age of sixty years, not being lawfully retained nor apprentice with any fisherman or mariner haunting the seas, nor being in service with any kidder or carrier of any corn, grain or meal for provision of the city of London, nor with any husbandman in husbandry, nor in any city, town corporate or market town, in any of the arts or sciences limited or appointed by this estatute to have or take apprentices, nor being retained by the year or half the year at the least for the digging, seeking, finding, getting, melting, fining, working, trying, making of any silver, tin, lead, iron, copper, stone, sea-coal, stone-coal, moor-coal or cherk-coal, nor being occupied in or about the making of any glass, nor being a gentleman born, nor being a student or scholar in any of the universities or in any school, nor having lands, tenements, rents or hereditaments for term of life, or of one estate of inheritance of the clear yearly value of forty shillings, nor being worth in goods and chattels to the value of ten pounds, nor having a father or mother then living, or other ancestor whose heir apparent he is then having lands, tenements or hereditaments of the yearly value of ten pounds or above, or goods or chattels of the value of forty pounds, nor being a necessary or convenient officer or servant lawfully retained as is aforesaid, nor having a convenient farm or holding whereupon he may or shall imploy his labour, nor being otherwise lawfully retained according to the true meaning of this estatute, shall after the aforesaid last day of September, now next ensuing, by virtue of this estatute, be compelled to be retained to serve in husbandry by the year with any person that keepeth husbandry and will require any such person so to serve within the same shire where he shall be so required. What sort of persons are compellable to serve by the year in husbandry.

8. And be it further enacted, by the authority of this present Parliament, that if any person after he hath retained any servant shall put away the same servant before the end of his term, unless it be for some reasonable and sufficient cause to be allowed as is aforesaid, or if any such master, mistress or dame shall put away any such servant at the end of his term without one quarter's warning given before the said end as is above remembered, that then every such master, mistress or dame so offending, unless he or they be able to prove by two such sufficient witnesses such reasonable and sufficient cause of putting away of their servant or servants during their term or a quarter's warning given before the end of the said term as is aforesaid before the justices of oyer and terminer, justices of assize, justices of peace in the quarter sessions, or before the mayor or other head officer of any city, borough or town corporate, and two aldermen or two other discreet burgesses of the same city, borough or town corporate if there be no aldermen, or before the lord president and council established in the marches of Wales, or before the lord president and council for the time being established in the north parts, shall forfeit the sum of forty shillings. The forfeiture for putting away his servant within his term, or at the end of his term, without warning.

9. And if any servant retained, according to the form of this estatute, depart from his master, mistress or dame's service before the end of his term, unless it be for some reasonable and sufficient cause to be allowed as is aforesaid, or if any servant at the end of his term depart from his said master, mistress or dame's service without one quarter's warning, given before the end of his said term, in form aforesaid, and before two lawful witnesses, or if any person The punishment of a servant which performeth not his duty in service or departure.

or persons compellable and bounden to be retained and to serve in husbandry, or in any other the arts, sciences or mysteries above remembered, by the year or otherwise, do (upon request made) refuse to serve for the wages that shall be limited, rated and appointed according to the form of this statute, or promise or covenant to serve and do not serve according to the tenor of the same, that then every servant so departing away, and every person so refusing to serve for such wages, upon complaint thereof made by the master, mistress or dame of the said servant, or by the party to or with whom the said refusal is made, or promise not kept, to two justices of peace of the county, or to the mayor or other head officer of the city, borough or town corporate, and two aldermen, or two other discreet burgesses of the same city, borough or town corporate, if there be no aldermen where the said master, mistress or dame, or the said party to or with whom the said refusal is made and promise not kept dwelleth, or to either of the said lords presidents and council of Wales and the North, the said justices, lords presidents and councils, and also the said mayors or other head officers, and other persons of cities, boroughs or towns corporate, or any of them, as is aforesaid, shall have power, by force of this statute, to hear and examine the matter, and finding the said servant or the said party so refusing faulty in the premises upon such proofs and good matter as to their discretions shall be thought sufficient to commit him or them to ward, there to remain without bail or mainprise until the said servant or party so offending shall be bound to the party to whom the offence shall be made to serve and continue with him for the wages that then shall be limited and appointed according to the tenor and form of this estatute, and to be discharged upon his delivery without paying any fee to the gaoler where he or they shall be so imprisoned (*d*).

None may depart forth of the city, town, parish, &c., without a testimonial.

10. And be it likewise enacted by the authority aforesaid, that none of the said retained persons in husbandry, or in any the arts or sciences above remembered, after the time of his retainer expired, shall depart forth of one city, town or parish to another, nor out of the lath, rape, wapentake or hundred, nor out of the county or shire where he last served to serve in any other city, town corporate, lath, rape, wapentake, hundred, shire or county, unless he have a testimonial under the seal of the said city or town corporate, or of the constable or constables, or other head officer or officers, and of two other honest householders of the city, town or parish where he last served, declaring his lawful departure, and the name of the shire and place where he dwelled last before his departure, according to the form hereafter expressed in this act, which certificate or testimonial shall be written and delivered unto the said servant, and also registered by the parson, vicar or curate of the parish where such master, mistress or dame doth or shall dwell, taking for the doing thereof twopence, and not above, and the form thereof shall be as followeth :—

The form of testimonial.

Memorandum.—That A. B., late servant to C. D., of E., husbandman or tailor, &c., in the county, &c., is licensed to depart from his said master, and is at his liberty to serve elsewhere, according to the statute in that case made and provided. In witness whereof, &c. Dated the day, month, year and place, &c., of the making thereof.

No servant shall be re-

11. And be it further enacted by the authority aforesaid, that no person or persons that shall depart out of a service shall be retained

(*d*) See further, *ante*, Ch. 9.

or accepted into any other service without showing before his retainer such testimonial, as is above remembered, to the chief officer of the town corporate, and in every other town and place to the constable, curate, churchwarden or other head officer of the same where he shall be retained to serve, upon the pain that every such servant so departing without such certificate or testimonial shall be imprisoned until he procure a testimonial or certificate, the which if he cannot do within the space of one-and-twenty days next after the first day of his imprisonment, then the said person to be whipped and used as a vagabond, according to the laws in such cases provided, and that every person retaining any such servant without showing such testimonial or certificate as is aforesaid shall forfeit for every such offence five pounds, and if any such person shall be taken with any counterfeit or forged testimonial, then to be whipped as a vagabond.

retained without shewing his testimonial.

The master shall pay 5*l.* that retaineth a servant without a testimonial.

12. And be it further enacted by the authority aforesaid, that all artificers and labourers, being hired for wages by the day or week, shall, betwixt the midst of the months of March and September, be and continue at their work at or before five of the clock in the morning, and continue at work, and not depart until betwixt seven and eight of the clock at night (except it be in the time of breakfast, dinner or drinking, the which times at the most shall not exceed above two hours and a-half in a day, that is to say, at every drinking one half hour, for his dinner one hour, and for his sleep, when he is allowed to sleep, the which is from the midst of May to the midst of August half an hour at the most, and at every breakfast one half hour), and all the said artificers and labourers, between the midst of September and the midst of March, shall be and continue at their work from the spring of the day in the morning until the night of the same day, except it be in time afore appointed for breakfast and dinner, upon pain to lose and forfeit one penny for every hour's absence, to be deducted and defaulked out of his wages that shall so offend.

How long labourers shall continue at their work.

13. And be it also enacted by the authority aforesaid, that every artificer and labourer that shall be lawfully retained in and for the building or repairing of any church, house, ship, mill or every other piece of work taken in great, in task, or in gross, or that shall hereafter take upon him to make or finish any such thing or work, shall continue and not depart from the same unless it be for not paying of his wages or hire agreed on, or otherwise lawfully taken or appointed to serve the Queen's Majesty, her heirs or successors, or for other lawful cause, or without license of the master or owner of the work, or of him that hath the charge thereof, before the finishing of the said work, upon pain of imprisonment by one month without bail or mainprise, and the forfeiture of the sum of five pounds to the party from whom he shall so depart, for the which the said party may have his action of debt against him that shall so depart in any of the Queen's Majesty's Courts of Record over and besides such ordinary costs and damages as may or ought to be recovered by the common laws for or concerning any such offence, in which action no protection, wager of law, or essoin shall be admitted.

No artificer or labourer shall depart before his work be finished.

14. And that no other artificer or labourer retained in any service to work with the Queen's Majesty, or any other person, depart from her said Majesty or from the said other person until such time as the work be finished, if the person so retaining the artificer or labourer so long will have him, and pay him his wages or other duties, upon pain of imprisonment of every person so departing by the space of one month.

[*Sects.* 15, 16, 17, 18 *and* 19 *repealed*, 53 *Geo.* 3, *c.* 40.]

Every retainer, contrary to this statute, shall be void.

20. And that every retainer, promise, gift or payment of wages or other thing whatsoever contrary to the true meaning of this estatute, and every writing and bond to be made for that purpose, shall be utterly void and of none effect.

[*Sect.* 21 *repealed*, 9 *Geo.* 4, *c.* 31. *ante*, p. 280.]

Artificers compellable to work in haytime and harvest.

22. Provided always, and be it enacted by the authority aforesaid, that in the time of hay or corn harvest the justices of peace, and every of them, and also the constable or other head officer of every township, upon request, and for the avoiding of the loss of any corn, grain or hay, shall and may cause all such artificers and persons as be meet to labour, by the discretions of the said justices or constables or other head officers, or by any of them, to serve by the day for the mowing, reaping, shearing, setting or inning of corn, grain and hay, according to the skill and quality of the person, and that none of the said persons shall refuse so to do upon pain to suffer imprisonment in the stocks by the space of two days and one night, and the constable of the town or other head officer of the same where the said refusal shall be made, upon complaint to him made, shall have authority, by virtue hereof, to set the said offender in the stocks for the time aforesaid, and shall punish him accordingly, upon pain to lose and forfeit for not doing thereof the sum of forty shillings.

A proviso for some that go into other shires for work in haytime and harvest.

23. Provided also, that all persons of the counties where they have accustomed to go into other shires for harvest-work, and having at that time no harvest-work sufficient in the same town or county where he or they dwelt in the winter then last past, bringing with him or them a testimonial (*e*) under the hand and seal of one justice of the peace of the shire or other head officer of the town or place that he or they come from testifying the same, for the which he shall pay not above one peny (other than such persons as shall be retained in service, according to the form of this estatute), may repair and resort in harvest of hay or corn from the counties wherein their dwelling-places are into any other place or county for the only mowing, reaping and getting of hay, corn or grain, and for the only working of harvest-works as they might have done before the making of this estatute, anything herein contained to the contrary notwithstanding.

Women compellable to serve that be above twelve, and under forty years old unmarried and forth of service.

24. And be it further enacted by the authority aforesaid, that two justices of peace, the mayor or other head officer of any city, borough or town corporate, and two aldermen, or two other discreet burgesses of the same city, borough or town corporate, if there be no aldermen, shall and may by virtue hereof appoint any such woman as is of the age of twelve years and under the age of forty years, and unmarried, and forth of service, as they shall think meet to serve, to be retained or serve by the year, or by the week or day, for such wages and in such reasonable sort and manner as they shall think meet, and if any such woman shall refuse so to serve, then it shall be lawful for the said justices of peace, mayor or head officers, to commit such woman to ward until she shall be bounden to serve as is aforesaid.

[*Sects.* 25 *to* 30, *inclusive*, *repealed*, 54 *Geo.* 3, *c.* 96.

Sects. 27 *and* 29 *were previously partly repealed*, 49 *Geo.* 3, *c.* 109.

(*e*) See as to *certificates* to prevent settlement (which have, however, grown into disuse since 35 Geo. 3, c. 101, which rendered poor persons irremovable till actually chargeable), 13 & 14 Car. 2, c. 12; 8 & 9 Will. 3, c. 30; 9 & 10 Will. 3, c. 11; 12 Anne, stat. 1, c. 18; 3 Geo. 2, c. 29; 51 Geo. 3, c. 80; 54 Geo. 3, c. 107; 1 & 2 Geo. 4, c. 32.

Sect. 31 *repealed*, 54 *Geo.* 3, *c.* 96.
having been partly repealed as to distillers, 12 *Ann. stat.* 2, *c.* 3.
as to certain officers in the army and navy, 22 *Geo.* 2, *c.* 44.
as to hatters, 17 *Geo.* 3, *c.* 55, *s.* 5.
as to clothiers, &c., 49 *Geo.* 3, *c.* 109.
See Rex v. *Kilderby*, 1 *Wms. Saund.* 309, *and notes.*
Sect. 32 *repealed*, 5 *& 6 Wm. & M. c.* 9.]

He that hath three apprentices must keep one journeyman.

33. And be it further enacted by the authority aforesaid, that all and every person and persons that shall have three apprentices in any of the said crafts, mysteries or occupations of a *clothmaker, fuller, sheerman, weaver* (*f*), taylor or shoemaker, shall retain and keep one journeyman, and for every other apprentice above the number of the said three apprentices one other journeyman, upon pain for every default therein ten pounds.

A proviso for the liberties of worsted-makers in Norwich and Norfolk.

34. Provided always, that this act nor anything therein contained shall not extend to prejudice or hinder any liberties heretofore granted by any Act of Parliament to or for the company and occupation of worstedmakers and worsted weavers within the city of Norwich, and elsewhere within the county of Norfolk, which liberties be in force until the beginning of this present Parliament, anything herein contained to the contrary in anywise notwithstanding.

The punishment of him that refuseth to be an apprentice.

35. And be it further enacted, that if any person shall be required by any householder having and using half a ploughland at the least in tillage to be an apprentice and to serve in husbandry, or in any other kind of art, mystery or science before expressed, and shall refuse so to do, that then upon the complaint of such housekeeper made to one justice of the peace of the county wherein the said refusal is or shall be made, or of such householder inhabiting in any city, town corporate or market town, to the mayor, bailiffs or head officer of the said city, town corporate or market town, if any such refusal shall there be, they shall have full power and authority by virtue hereof to send for the same person so refusing, and if the said justice or the said mayor or head officer shall think the said person meet and convenient to serve as an apprentice in that art, labour, science or mystery, wherein he shall be so then required to serve, that then the said justice, or the said mayor or head officer, shall have power and authority by virtue hereof, if the said person refuse to be bound as an apprentice, to commit him unto ward, there to remain untill he be contented and will be bounden to serve as an apprentice should serve according to the true intent and meaning of this present act. And if any *such* (*g*) master shall misuse or evil intreat his apprentice, or that the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice, being grieved and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor or other head officer of the city, town corporate, market town or other place where the said master dwelleth, who shall by his wisdom and discretion take such order and direction between the said master and his apprentice as the equity of the cause shall require; and if for want of good conformity in the said master, the said justice of peace, or the said mayor or

The remedy for the apprentice which is misused by his master, and for the master when the apprentice doth not his duty.

(*f*) Repealed as to trades in *italics*, 49 Geo. 3, c. 109.

(*g*) The jurisdiction of the justices extends to apprentices in *all* trades, not merely those named in the statute, *R.* v. *Collinbourn*, 2 Lord Raym. 1410; *S. C.* 1 Str. 663.

other head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate or market town, to be before the justices of the said county, or the mayor or head officer of the said town corporate or market town, if the said master dwell within any such; and upon his appearance and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticehood, that then the said justices, or four of them at the least, whereof one to be of the quorum, or the said mayor or other head officer, with the assent of three other of his brethren or men of best reputation within the said city, town corporate or market town, shall have power by authority hereof in writing under their hands and seals to pronounce and declare that they have discharged the said apprentice of his apprenticehood and the cause thereof, and the said writing so being made and enrolled by the clerk of the peace or town clerk amongst the records that he keepeth shall be a sufficient discharge for the said apprentice against his master, his executors and administrators, the indenture of the said apprenticehood or any law or custom to the contrary notwithstanding (*i*); and if the default shall be found to be in the apprentice, then the said justices, or the said mayor or other head officer with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretions shall be thought meet.

Where an apprentice may be discharged of his apprenticehood.

Apprentices to be under twenty-one years of age.

36. Provided always, and be it enacted by authority of this present Parliament, that no person shall by force or colour of this estatute be bounden to enter into any apprenticeship other than such as be under the age of twenty-one years.

Assembly of the justices twice in the year for the due execution of this statute.

37. And to the end that this estatute may from time to time be carefully and diligently put in good execution according to the tenor and true meaning thereof, be it enacted by authority of this present Parliament, that the justices of peace of every county, dividing themselves into several limits, and likewise every mayor and head officer of any city or town corporate, shall yearly, between the Feast of St. Michael the Archangel and the Nativity of our Lord, and be-

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(*i*) It is perfectly clear and not now to be disputed, though it was once thought otherwise, that the sessions have an *original* jurisdiction under this section to discharge an apprentice, and application need not be made to one justice first, *R.* v. *Johnson*, 1 Salk. 68; *S. C.* 2 Salk. 491; *R.* v. *Gill*, 1 Str. 143; *R.* v. *Davie*, 2 Str. 704; *R.* v. *Easman*, 2 Str. 1014. And see *Hawkesworth* v. *Hillary*, 1 Wms. Saund. 313, that it was the intention of the act that a master should be discharged of a bad apprentice, as well as an apprentice of a bad master. But the justices have no power under this section to direct the return of any part of the premium paid to the master, or the non-payment of any part of it remaining unpaid, *East* v. *Pell*, 4 M. & W. 665. *Semble*, *per* Alderson, B., that it does not apply to cases where a premium is given, but only to compulsory bindings without premium. *Semble*, also, that *R.* v. *Collinbourn*, *ubi supra*, is no authority to the contrary, as according to the report in Lord Raymond, the apprentice there had been bound before the Chamberlain, which would hardly have been necessary if it had not been a compulsory binding.

tween the Feast of the Annunciation of our Lady and the Feast of the Nativity of St. John Baptist, by all such ways and means as to their wisdoms shall be thought most meet, make a special and diligent inquiry of the branches and articles of this estatute and of the good execution of the same, and where they shall find any defaults to see the same severely corrected and punished without favour, affection, malice, or displeasure.

The justices' allowance for their pains.

38. And in consideration of the pains and travel that the said justice of peace and the said mayor or head officer shall take and sustain in and about the execution of this estatute, it is further ordained and enacted, by authority of this present Parliament, that every justice of peace, mayor, or head officer, for every day that he shall sit in and about the execution of this estatute, shall have allowed unto him five shillings, to be allowed and paid unto him, or unto the said mayor or head officer, of the fines and forfeitures of the pains and penalties that shall be forfeited and due unto the Queen's Majesty, her heirs and successors, by force of this estatute, in such manner and form as the said justices have been heretofore commonly paid for their coming and charges at the quarter sessions, so that the sitting of the said justices, or mayor or head officer, be not at any one time above three days, and for the matters contained in this estatute.

Who shall have the forfeitures mentioned in this statute.

39. And be it enacted, by authority aforesaid, that the one-half of all forfeitures and penalties expressed and mentioned in this estatute, other than such as are expressly otherwise appointed, shall be to our sovereign Lady the Queen's Majesty, her heirs and successors, and the other moiety to him or them that shall sue for the same in any of the Queen's Majesty's courts of record, or before any of the justices of oyer and terminer, or before any other justices or president and council before remembred, by action of debt, information, bill of complaint or otherwise (*k*), in which actions or suits no protections, wager of law, or essoin shall be allowed; and that the said justices, or two of them, whereof one to be of the quorum, and the said presidents and council as is aforesaid, and the said mayors or other head officers of cities or towns corporate, shall have full power and authority to hear and determine all and every offence and offences that shall be committed or done against this estatute, or against any branch thereof, as well upon indictment to be taken before them in the sessions of the peace, as upon information, action of debt or bill of complaint, to be sued or exhibited by any person, and shall and may by virtue hereof make process against the defendant and award execution as in any other case they lawfully may by any the laws and statutes of this realm, and shall yearly, in Michaelmas Term, certify by estreat the fines and forfeitures of every the offences contained in this estatute that shall be found before them into the Court of Exchequer, in like sort and form as they be bound to certify the estreats for other offences and forfeitures to be lost before them, anything in this statute contained to the contrary notwithstanding (*l*).

Justices of peace, mayor, &c., may hear and determine all offences committed against this statute.

A proviso for the cities of London and Norwich.

40. Provided always, that this act, or anything therein contained or mentioned, shall not be prejudicial or hurtful to the cities of London (*m*) and Norwich, or to the lawful liberties, usages, customs or privileges of the same cities for or concerning the having or taking

(*k*) As to actions for penalties under this section, see 31 Eliz. c. 5; 21 Jac. 1, c. 4; 1 Wms. Saund. 312 *a*, note; *Fife* v. *Bousfield*, 6 Q. B. 100.

(*l*) And see 54 Geo. 3, c. 96, s. 3.

(*m*) See *R.* v. *Collinbourn*, 2 Lord Raym. 1410; *S. C.* 1 Str. 663; and see 54 Geo. 3, c. 96, s. 4.

of any apprentice or apprentices, but that the citizens and freemen of the same cities shall and may take, have, and retain apprentices there in such manner and form as they might lawfully have done before the making of this statute, this act or anything therein contained to the contrary in anywise notwithstanding.

[*Sect.* 41 *repealed*, 54 *Geo.* 3, *c.* 96.]

He that is bound apprentice within the age of twenty-one years is compellable to serve.

42. *And because there hath been and is some question and scruple moved whether any person, being within the age of one-and-twenty years, and bounden to serve as an apprentice in any other place than in the said city of London, should be bounden, accepted, and taken as an apprentice :*

43. For the resolution of the said scruple and doubt be it enacted, by authority of this present Parliament, that all and every such person or persons that at any time or times from henceforth shall be bounden by indenture to serve as an apprentice in any art, science, occupation, or labour, according to the tenor of this estatute and in manner and form aforesaid, albeit the same apprentice or any of them shall be within the age of one-and-twenty years at the time of the making of their several indentures, shall be bounden to serve for the years in their several indentures contained as amply and largely to every intent (*n*) as if the same apprentice were of full age at the time of the making of such indentures, any law, usage or custom to the contrary notwithstanding.

A proviso for the inhabitants of Godalming, in Surrey.

44. Provided always, and be it enacted, by the authority aforesaid, that the inhabitants now dwelling or inhabiting, or that hereafter shall dwell or inhabit within the town of Godalming, within the county of Surrey, within the limits of the watch of the said town, may use and exercise such arts, mysteries and occupations, and take and use apprentices and servants in such manner and form as the inhabitants within market towns by this statute may lawfully do.

Who shall have the forfeiture in cities and towns corporate.

45. Provided always, and be it enacted, by the authority aforesaid, that all manner amerciaments, fines, issues and forfeitures which shall arise, grow or come by reason of any offences or defaults mentioned in this act or any branch thereof within any city or town corporate, shall be levied, gathered and received by such person or persons of the same city or town corporate as shall be appointed by the mayor or other head officers mentioned in this said act, to the use and maintenance of the same city or town corporate, in such case and condition as any manner other amerciaments, fines, issues or forfeitures have been used to be levied and employed within the same city or town corporate by reason of any grant or charter from the Queen's Majesty that now is, or of any her Grace's noble progenitors, made and granted to the same city, borough or town corporate, any thing or clause before mentioned and expressed in this act to the contrary notwithstanding.

[*Sect.* 46 *is merely a proviso that this act shall not extend to any lawful retainings or covenants had or made before the passing of this act.*]

A remedy for those servants which depart from their masters and do flee into other shires.

47. And be it further enacted, by the authority aforesaid, that if any servant or apprentice of husbandry, or of any art, science or occupation aforesaid, unlawfully depart or flee into any other shire, that it shall be lawful to the said justices of peace, and to the said mayors, bailiffs and other head officers of cities and towns corporate for the time being justices of peace there, to make and grant writs of *capias* so many and such as shall be needful, to be directed

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(*n*) But an infant apprentice is not hereby rendered liable to an *action* for breach of the covenants in his indentures, *Gylbert* v. *Fletcher*, Cro. Car. 179.

to the sheriffs of the counties or to other head officers of the places whither such servants or apprentices shall so depart or flee, to take their bodies, returnable before them at what time shall please them, so that if they come by such process that they be put in prison till they shall find sufficient surety well and honestly to serve their masters, mistresses or dames, from whom they so departed or fled, according to the order of the law.

High constables may keep statute sessions.

48. Provided always, that it shall be lawful to the high constables of hundreds in every shire to hold, keep and continue petty sessions, otherwise called statute sessions, within the limits of their authorities, in all shires wherein such sessions have been used to be kept, in such manner and form as heretofore hath been used and accustomed, so as nothing be by them done therein contrary or repugnant to this present act.

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22 GEO. 2, c. 27.

An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linnen, *Fustian,* Cotton, *Iron, Leather, Furr, Hemp,* Flax, Mohair and Silk (*o*) *Manufactures; and for preventing unlawful Combinations of Journeymen Dyers and Journeymen Hotpressers, and of all Persons employed in the said several Manufactures; and for the better Payment of their Wages.*

Preamble reciting several clauses in act 13 Geo. 2, and 1 Anne.

Whereas by an act made in the thirteenth year of his present Majesty's reign, intituled "An Act to explain and amend an Act made in the first year of the reign of her late Majesty Queen Anne, intituled 'An Act for the more effectual preventing the Abuses and Frands of Persons employed in the working up the Woollen, Linnen, Fustian, Cotton and Iron Manufactures of this Kingdom, and for extending the said Act to the Manufactures of Leather,'" it is amongst other things enacted, that if any person or persons hired or employed in the working up of any woollen, linnen, fustian, cotton or iron manufactures shall purloin, imbezil, secrete, sell, pawn, exchange or otherwise illegally dispose of any the materials with which he, she or they shall be respectively entrusted to work up such woollen, linnen, fustian, cotton or iron manufactures, whether the same be or be not first made up or manufactured, or shall reel false or short yarn, the person or persons so offending, and being thereof convicted in manner prescribed by the said act of the first year of her said late Majesty's reign, shall forfeit double the value of the damages which the owner or owners of such materials shall respectively sustain thereby, together with full costs of prosecution for every such offence; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then it shall and may be lawful to and for the same justice of the peace, before whom such conviction shall be made, to cause the offender or offenders to be committed to the house of correction, to be there whipped and kept to hard labour for any time not exceeding fourteen days; and in case

13 Geo. 2, c. 8, s. 1.

Manufacturers of woollen, &c., embezilling materials.

(*o*) Repealed as to woollen, linen, cotton, flax, mohair, and silk manufactures, 6 & 7 Vict. c. 40, *post.*

of a further conviction for a second or other subsequent offence, for imbezilling or purloining any of the materials in the said act of the first year of her said late Majesty's reign mentioned, that the person or persons so offending shall, for every second or other subsequent offence, forfeit four times the value of the damages which the owner or owners of such materials (whether the same be or be not made up or manufactured) shall sustain thereby, together with such costs of prosecution as shall be adjudged reasonable by the justice before whom such offender or offenders shall be respectively convicted; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then such justice, or any other justice of the peace for the county, riding, division, city, town or place where such offences shall be committed, shall cause the said offenders to be committed to the house of correction, to be there kept to hard labour for any time not exceeding three months, nor less than one month, as to such justice shall seem reasonable; and also during the time of such commitment shall cause the said offender or offenders to be publickly whipped in the market town where such offender or offenders shall be respectively committed, at the market place or cross of such town, once or oftener, as to such justice shall seem reasonable; and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that every person or persons who shall buy or receive, accept or take, by way of gift, pawn, pledge or sale, of or from any of the persons in the said act of the first year of her said late Majesty's reign mentioned, any woollen, linnen, fustian, cotton, or iron manufactures, either before or after the same shall be manufactured or converted into merchantable wares, knowing the same to be so purloined or imbezilled, and being thereof lawfully convicted, shall severally suffer the like forfeitures and penalties as are by the said acts respectively inflicted on persons purloining or imbezilling such of the materials or manufactures enumerated in the said acts respectively; all which forfeitures, when recovered, are by the said act of the thirteenth year of his present Majesty's reign directed to be applied in manner following; that is to say, one moiety thereof to the use of the party or parties injured, and the other moiety to the use of the poor of the parish only where the offence shall be committed, with the like liberty and benefit of appealing to all parties as is given in and by the said act of the first year of her said late Majesty: and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that if any person or persons hired or employed in cutting, paring, washing, dressing, sewing, making up, or otherwise manufacturing of gloves, breeches, leather, skins, boots, shoes, slippers, wares, or other goods or merchandizes, to be made use of in any of the trades or employments, or in manner last mentioned, or in any branch or particular thereof, shall fraudulently purloin, imbezil, secrete, sell, pawn, or exchange all or any part of the gloves, breeches, leather, skins, parings, or shreads of gloves, or leather, or other materials with which he, she or they shall be entrusted to work up or manufacture, or shall purloin, imbezil, secrete, sell, pawn or exchange any gloves, breeches, boots, shoes, slippers or wares when made, wrought up, or manufactured, or do or wilfully permit any other act to lessen the value of such, or any part of such gloves, breeches, leather, skins, parings or shreads of gloves or leather, boots, shoes, slippers or other wares last particularized, either before or after the same shall be respectively so made into wares, and be thereof lawfully convicted, in manner prescribed by the said last mentioned act,

13 Geo. 2, c. 8, s. 2. Receivers.

Sect. 3.

Sect. 4. Workers in leather embezilling materials.

before one or more justice or justices of the peace for the county, riding, division, city, town or place, where such offence shall be committed, or where the party or parties so charged shall reside or inhabit, such justice or justices shall and may award the person or persons so offending to make a reasonable and suitable recompence and satisfaction for every offence to the parties respectively injured, for the damage by them sustained, so as the same do not exceed double the value of the gloves, breeches, leather, boots, shoes, slippers, wares, goods or materials by such offender or offenders so purloined or imbezilled, secreted, sold, pawned or exchanged; one-half thereof to go to the party or parties grieved, and the other half to the use of the poor of the parish or place where such offence shall be committed, together with the full charges attending such conviction, to be levied by warrant under the hand and seal or hands and seals of such justice or justices, by distress and sale of the offender's goods; but if such offender or offenders shall not have goods sufficient to answer the forfeitures and the expenses attending the premisses, and shall also neglect or refuse immediately to pay the same, that then the said offender or offenders shall, by like warrant of such justice or justices last described, be for every distinct offence committed to the house of correction, or other publick prison of such county, riding, city, town or place, and there kept to hard labour for the space of fourteen days, and shall be there likewise whipped in such manner as the said justice or justices shall order and direct; and in case also of a subsequent conviction for a second or any other such like offence, that the person or persons so offending, for every second or other subsequent offence, shall forfeit four times the value of the damages which the owner or owners of such materials, either before or after the same shall be respectively made up into wares, shall sustain thereby, together with such costs of prosecution as shall be adjudged reasonable by the justice before whom such offender or offenders shall be respectively convicted; and in case immediate payment of the respective forfeitures, together with such costs of prosecution as aforesaid, shall be neglected or refused to be made, that then it shall and may be lawful to and for such justice to commit the offender or offenders last described to the house of correction or other publick prison, to be there kept to hard labour for any time not exceeding three months, nor less than one month, as to such justice shall seem reasonable; and also during the time of such commitment shall cause the said offender or offenders to be publickly whipped in the market town where such offender or offenders shall be respectively committed, at the market-place or cross of such town, once or oftener, as to such justice shall seem reasonable; and it is by the said act of the thirteenth year of his present Majesty's reign also further enacted, that every person and persons who shall knowingly or willingly buy or receive, accept or take, by way of pawn, pledge, sale, or in any other manner, of or from any of the persons offending in either of the particulars last mentioned, or of or from any other person or persons whatsoever (except of or from the person or persons in whom the property of such gloves, breeches, leather, boots, shoes, slippers, wares, goods, or other materials shall be at the time of such sale, pawn, or exchange), or offer so to do, such person or persons offending therein respectively shall for every offence, being convicted thereof in manner before prescribed by the said last mentioned act, make such suitable and reasonable recompence and satisfaction, within two days next after the matter or fact shall be determined by any one or more justice or justices as

13 Geo. 2, c. 8, s. 5. Receivers.

aforesaid, upon hearing the same, or else be subject to such distress, and, for want of sufficient distress, to be liable to the like punishment as is by the said act directed to be inflicted on such person or persons as shall purloin, imbezil, secrete, sell, pawn, or exchange any gloves, breeches, leather, boots, shoes, slippers, wares, goods or other materials or effects of that sort as aforesaid, and so in like manner for any second and every other subsequent offence: *and whereas* the penalties and forfeitures to which offenders against the said acts are subjected have not been sufficient to deter persons from committing the offences thereby intended to be prevented: *and whereas* many persons employed in the making of felts or hats, and in preparing or working up the manufactures of furr, hemp, flax, mohair, and silk, and also the manufactures made up of wool, furr, hemp, flax, mohair, cotton, or silk, or some of them mixed one with another, have of late been guilty of divers frauds and abuses, by purloining, imbezilling, secreting, selling, pawning, exchanging, or otherwise unlawfully disposing of the materials with which they have been intrusted; and it is therefore become necessary to make provision for preventing such offences for the future: therefore, for amending and rendering more effectual the said act made in the thirteenth year of his present Majesty's reign, and for extending the provisions and regulations therein and herein made to the several manufactures hereinbefore mentioned, *be it enacted* by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that if any person or persons whatsoever who shall be hired or employed to make any felt or hat, or to prepare or work up any woollen, linnen, fustian, cotton, iron, leather, furr, hemp, flax, mohair, or silk manufactures, or any manufactures made up of wool, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another, shall, from and after the twenty-fourth day of June, one thousand seven hundred and forty-nine, purloin, imbezil, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any of the materials with which he, she or they shall be respectively intrusted, whether the same or any part thereof be or be not first wrought, made up, manufactured or converted into merchantable wares (*p*), or shall reel false or short yarn (*q*), and shall be thereof lawfully convicted (*r*) by the oath or (if the owner thereof be of the people called Quakers) solemn affirmation of the owner of such goods or materials, or by the oath or affirmation of any other credible witness or witnesses, or by the confession of the person or persons charged with such offence, before any one (*s*) or more justice or justices of the peace of the county, riding, division, city, liberty, town or place where such offence shall be committed, or where the person or per-

Persons employed in the manufactures herein particularized, being convicted of embezzling, &c., any of the materials,

or of reeling false or short yarn,

(*p*) See 17 Geo. 3, c. 56, *post*, and sect. 16, as to tools, &c.

(*q*) This punishment *for reeling false or short yarn* having been found too severe was repealed, 14 Geo. 3, c. 44, and a punishment by penalty for the first offence not exceeding 20*s.* nor less than 5*s.*; for the second offence, not exceeding 5*l.* nor less than 40*s.*; and for the third and subsequent offences, imprisonment with hard labour for one calendar month, and to be once publicly whipped at the nearest market town on a market day, substituted.

(*r*) As to form of conviction, see 58 Geo. 3, c. 51, s. 5; but see also 11 & 12 Vict. c. 43.

(*s*) Two, 17 Geo. 3, c. 56, s. 2, *post*.

sons so charged shall reside or inhabit (which oath or affirmation the said justice or justices is and are hereby impowered and required to administer), it shall and may be lawful to and for the said justice or justices, by warrant under his or their hand and seal or hands and seals, to commit the person or persons so convicted to the house of correction, or other public prison of such county, riding, division, city, liberty, town or place, there to be kept to hard labour for the space of fourteen days, and also to order the person or persons so convicted to be once publickly whipped at the market place, or some other publick place of the city, town or place where such offender or offenders shall be respectively committed; and in case of a further conviction in manner before prescribed by this act, for or upon a second or other subsequent offence of the same kind, it shall and may be lawful to and for the justice or justices before whom such conviction shall be had, to commit the person or persons so again offending to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and also to order the person or persons so again offending to be publickly whipped at the market place, or some other publick place of the city, town or place where such offender or offenders shall be respectively committed, twice or oftener, as to such justice or justices shall appear reasonable (*t*); anything in the said act of the first year of her said late majesty's reign, or in the said in part recited act of the thirteenth year of his present majesty's reign, to the contrary in anywise notwithstanding.

to be committed;

and be publickly whipped.

Penalty of a further conviction or subsequent offence.

2. And be it further enacted by the authority aforesaid, that if any person or persons shall buy, receive, accept or take, by way of gift, pawn, pledge, sale or exchange, or in any other manner whatsoever, of or from any person or persons hired or employed to make any felt or hat, or to prepare or work up the woollen, linnen, fustian, cotton, iron, leather, furr, hemp, flax, mohair or silk manufactures, or any manufactures made up of wooll, furr, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, any thrums or ends of yarn, or any other materials of wooll, furr, hemp, flax, cotton or iron, or any leather, mohair or silk, whether the same or any part thereof be or be not first wrought, made up or manufactured, knowing the person or persons of whom he, she or they so buy, receive, accept or take the said materials to be so hired or imployed as aforesaid, and not having first obtained the consent of the person or persons so hiring or imploying him, her or them, who shall offer to sell, pawn, pledge, exchange or otherwise dispose of the said materials, or shall buy, receive, accept or take in any manner whatsoever, of or from any other person or persons whomsoever, any of the said materials, whether the same be or be not first wrought, made up or manufactured, knowing the same to be so purloined or imbezzilled, then and in every such case the person or persons so buying, receiving, accepting or taking any such materials, being thereof lawfully convicted in manner before prescribed by this act for the conviction of persons purloining or imbezzilling the said materials, shall for the first offence forfeit the sum of twenty pounds (*u*); and in case the said forfeiture shall not be immediately paid, the justice or justices before whom such conviction shall be had, shall commit the party or parties so convicted to the house of correction, or other

Persons convicted of buying or receiving any of the materials from the workmen without consent of their employers,

to forfeit for the first offence 20*l.*,

and on non-payment of the penalty to be committed;

(*t*) See 17 Geo. 3, c. 56, *post*, which alters the punishment, and sect. 16, as to tools, &c.

(*u*) See 17 Geo. 3, c. 56, *post*; and sect. 16, as to tools, &c.

publick prison as aforesaid, there to be kept to hard labour for the space of fourteen days, unless the said forfeiture shall be sooner paid; and if, within two days before the expiration of the said fourteen days, the said forfeiture shall not be paid, the said justice or justices is and are hereby impowered and required to order the person or persons so convicted to be publickly whipped at the market place, or some other publick place of the city, town or place where such offender or offenders shall be respectively committed, once or oftener, as to such justice or justices shall appear reasonable; and in case of a further conviction for or upon a second or any other subsequent offence of the same kind, the person or persons so again offending, being thereof convicted in manner before prescribed by this act, shall for every second or other subsequent offence, forfeit the sum of forty pounds (*x*); and in case the said forfeiture shall not be immediately paid, the justice or justices before whom such conviction shall be had shall commit the party or parties so convicted to the house of correction, or other publick prison as aforesaid, there to be kept to hard labour for any time not exceeding three months, nor less than one month, unless the said forfeiture shall be sooner paid; and if, within seven days before the expiration of the time for which such offender or offenders shall be so committed, the said forfeiture shall not be paid, the said justice or justices is and are hereby impowered and required to order such offender or offenders to be publickly whipped at the market place or some other publick place of the city, town or place where he, she or they shall be respectively committed, twice or oftener, as to such justice or justices shall appear reasonable; and the said respective forfeitures of twenty pounds and forty pounds, when recovered, after satisfaction shall have been made thereout to the party or parties injured, together with such costs of prosecution as shall be judged reasonable by the justice or justices before whom such conviction shall have been had, shall be equally distributed amongst the poor of the parish or place where the person or persons so convicted shall reside or inhabit; anything in the said two first-mentioned acts, or either of them, to the contrary in anywise notwithstanding.

and to be publickly whipped;

and, in case of a further conviction, or subsequent offence, to forfeit 40*l.*, &c.

Application of the forfeitures.

3. Provided always, and it is hereby enacted, that if any person convicted as aforesaid of buying, receiving or taking to pawn any of the materials hereinbefore mentioned, shall think himself or herself aggrieved by the judgment of the justice or justices before whom he or she shall have been convicted, such person shall have liberty to appeal to the justices at the next general or quarter sessions of the peace which shall be held for the county, riding, division, city, liberty, town or place where such judgment shall have been given; and that the execution of the said judgment shall in such case be suspended, the person so convicted entering into a recognizance at the time of such conviction, with two sufficient sureties, in double the sum which such person shall have been adjudged to forfeit, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of the justices in the said general or quarter sessions; which recognizance the said justice or justices before whom such conviction shall be had is and are hereby impowered and required to take; and the justices in the said general or quarter sessions are hereby authorized and required to hear and finally determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if, upon the hearing of the said appeal,

Liberty of appeal given to persons convicted of buying or receiving any of the said materials.

In such case execution to be suspended, the appellant entering into recognizance, and giving security, &c.

Justices at the quarter sessions to determine the appeal, &c.

(*x*) See 17 Geo. 3, c. 56, ss. 3 and 4, *post*, whereby the penalties are increased.

the judgment of the justice or justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said general or quarter sessions shall award to be paid by him or them for defraying the expences sustained by the defendant or defendants in such appeal; or, in default of making such payments, shall suffer the respective pains and penalties by this act inflicted upon persons who shall neglect to pay or shall not pay the respective forfeitures by this act imposed upon such as shall be convicted of buying, receiving or taking to pawn any of the materials hereinbefore mentioned, which shall have been purloined or imbezzilled.

Justices impowered to grant a warrant to search the houses, &c., of persons convicted of purloining, &c., any of the materials, &c.,

4. And be it further enacted by the authority aforesaid, that if any person or persons shall be charged with and afterwards convicted (*y*) of purloining or embezzilling any of the aforesaid materials, or of buying or receiving the same in manner before described, it shall and may be lawful to and for the justice or justices of the peace before whom such conviction shall be had to issue a warrant under his or their hand and seal, or hands and seals, directed to any person or persons, impowering him or them, in the presence of a constable or headborough, and in the day-time to enter into and search the houses, out-houses, shops, cellars, vaults and other places belonging to (*y*) the person or persons so convicted as aforesaid; and if upon any such search or searches there shall be found any thrums or ends of yarn, or any other materials of wooll, furr, hemp, flax, cotton, iron, leather, mohair or silk, it shall and may be lawful to and for the person or persons impowered to make such search or searches as aforesaid to bring such materials before the said justice or justices, to be by him or them detained and kept in safe custody; and if within the space of twenty-four days next after such thrums or ends of yarn, or other materials, shall be so taken and detained, it shall be made appear to the satisfaction of the said justice or justices that the person or persons from whose houses, out-houses, shops, cellars, vaults or other places as aforesaid, the said materials shall be so taken and detained, is or are the lawful owner or owners thereof, and came to the possession of the same in an honest and lawful manner, then all such thrums or ends of yarn, or other materials, so taken and kept as aforesaid, shall be restored to the person or persons out of whose custody or possession the same shall have been so taken; but in case it shall not be made appear within the time before limited, to the satisfaction of the said justice or justices, that the person or persons convicted as aforesaid is or are the lawful owner or owners of the said materials so taken and detained as aforesaid, then and in every such case the said materials shall be deemed and adjudged to be purloined or embezzilled; and it shall and may be lawful to and for the said justice or justices to direct all such thrums or ends of yarn, or other materials, to be publickly sold, and the money arising by such sale (the charges of such sale being first deducted) to be equally distributed amongst the poor of the parish or place where the person or persons so convicted shall reside or inhabit.

the persons from whose houses such materials were taken, proving their property therein, to have them restored;

if not, they are to be sold, and the money distributed among the poor.

Justices to give notice to the convict of the materials

5. Provided always, and it is hereby enacted, that the said justice or justices shall, within three days after such materials shall be brought to him or them as aforesaid, give notice thereof in writing under his or their hand and seal, or hands and seals, to the person or

(*y*) See 17 Geo. 3, c. 56, s. 10, *post*, p. 399, as to search *before* conviction, and in premises *not belonging to* person convicted.

brought to him in order to prove his property therein, &c.

persons convicted as aforesaid, appointing in such notice a time and place for his, her or their attending in order to make out and prove his, her or their property in such materials so taken and detained as aforesaid; which time so to be appointed shall be within twenty-one days and not less than eighteen days after such notice given; and if the person or persons so convicted shall be detained in any house of correction or other prison as aforesaid, the said justice or justices shall also cause a copy of the said notice, attested under his or their hand and seal or hands and seals, to be delivered to the master or keeper of such house of correction or other prison, which master or keeper is hereby required to bring or cause to be brought before such justice or justices the person or persons named in such notice, at the time and place therein specified, if the person or persons named in such notice be then in the custody of such master or keeper; and if any such master or keeper shall neglect or refuse so to do, such master or keeper shall, for every such neglect or refusal, forfeit to the person or persons respectively named in such notice the full value of the materials so taken, detained and sold, to be recovered by distress and sale of the goods and chattels of such master or keeper, by warrant under the hand and seal or hands and seals of the justice or justices signing such notice, in case the said forfeiture shall not be immediately paid.

Penalty on the keeper of the prison not bringing the prisoner.

Persons aggrieved may appeal.

6. Provided also, and it is hereby further enacted, that if any person shall think himself or herself aggrieved by the judgment or order of the said justice or justices relating to the sale or disposal of the said materials so found and detained as aforesaid, such person shall have liberty to appeal against the judgment or order of the said justice or justices to the justices of the peace in the general or quarter sessions of the peace which shall be held for the same county, riding, division, city, liberty or town corporate, next after such judgment or order shall be given or made; and that in the mean time the sale and disposal of such materials shall be postponed; notice in writing under the hand of the person intending to appeal, signifying such his or her intention, being given to the justice or justices by whom such order shall have been made before the time appointed for the sale and disposal of such materials; and the justices of the peace in the said general or quarter sessions of the peace are hereby authorized and impowered to summon and examine witnesses upon oath (or being of the people called Quakers, upon their solemn affirmation), and to hear and finally determine the matter of the said appeal; and in case the said appellant shall not prosecute such his or her appeal, or for any other cause the judgment of the said justice or justices by whom such order shall have been made shall be affirmed, it shall and may be lawful to and for the justices in the said general or quarter sessions of the peace to award such costs as they in their discretion shall think reasonable, to be paid by the appellant for defraying the expenses sustained by the defendant or defendants in such appeal.

Notice of appeal to be given.

Justices at their quarter sessions to determine the appeal, &c.

Penalty on workmen not returning the remains of the materials within twenty-one days after

7. And be it further enacted by the authority aforesaid, that if any person or persons entrusted with any of the materials hereinbefore mentioned, in order to prepare, work up or manufacture the same, shall not use all such materials in the preparing, working up or manufacturing of the same, and shall neglect or delay for the space of twenty-one days (z) after such materials shall be prepared, worked up or manufactured, to return (if required by the owner or owners of

(z) See 17 Geo. 3, c. 56, s. 7, *post*.

such materials so to do) so much of the said materials as shall not be used as aforesaid to the person or persons entrusting him, her or them therewith, such neglect or delay shall be deemed and adjudged to be an imbezzilling or purloining of such materials; and the person or persons so neglecting or delaying, being thereof convicted in manner before prescribed for the conviction of offenders against this act, shall suffer the like punishment (*a*) as persons convicted of imbezzilling or purloining any of the materials hereinbefore mentioned are by this act rendered subject and liable to. the work is made up.

8. And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any one justice of the peace of any county, riding, division, city, liberty, town or place, and he is hereby required, upon complaint to him made upon oath or (if the person complaining be of the people called Quakers) solemn affirmation of any offence committed against this act within the same county, riding, division, city, liberty, town or place, to issue his warrant for apprehending and bringing before him, or before any other justice or justices of the peace of the same county, riding, division, city, liberty, town or place, the person or persons charged with such offence; and the justice or justices before whom such person or persons shall be brought is and are hereby authorized and required to hear and determine the matter of every such complaint, and to proceed to conviction and judgment thereupon. Justice to issue his warrant upon complaint on oath of any offence against this act, and to determine the same.

9. And for the better regulating of the journeymen and other persons employed as manufacturers or workers in the manufacture of felts or hats, and in the woollen, linnen, fustian, cotton, iron, mohair, furr, hemp, flax or silk manufactures, or any manufactures made up of wooll, furr, hemp, flax, linnen, cotton, mohair or silk, or any of the said materials mixed one with another, be it further enacted by the authority aforesaid, that if any person who, at any time after the said twenty-fourth day of June one thousand seven hundred and forty-nine, shall be hired, retained or employed to prepare or work up any of the manufactures hereinbefore mentioned for any one master, shall neglect or refuse the performance thereof, by procuring or permitting himself or herself to be subsequently retained or employed by any other master or person whatsoever, before he or she shall have completed the work which he or she was first and originally so hired, retained or employed to perform, and which was first delivered to him or her, then and in every such case the person so offending, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before one or more justice or justices of the peace of the county, riding, division, city, liberty, town or place where the offence or offences shall be committed, shall be sent to the house of correction, there to be kept to hard labour for any time not exceeding one month (*b*). Journeymen not completing their work for which they were employed, &c., to be committed.

10. Provided always, and it is hereby enacted and declared that this act, or anything therein contained, shall not extend or be construed to extend to repeal any of the provisions mentioned and contained in an act made in the thirteenth and fourteenth years of the reign of King Charles the Second, intituled "An Act for regulating the Trade of Silk-throwing;" or in an act made in the twentieth year of the reign of King Charles the Second, intituled "An Act to regulate the Trade of Silk-throwing;" or in an act made in the eighth and ninth years of the reign of King William the Third, intituled "An Act for Limitation of the powers of this act. Act 13 & 14 Car. 2, c. 15. Act 20 Car. 2, c. 6. Act 8 & 9 Will. 3, c. 36.

(*a*) See 17 Geo. 3, c. 56, s. 7, *post.*

(*b*) Sect. 9 is repealed by 17 Geo. 3, c. 56, s. 8, *post.*

the further Encouragement of the Manufacture of Lustrings and Alamodes within this Realm, and for the better preventing the Importation of the same; for the Punishment of Silk Winders, Doublers, and other Persons convicted of purloining, imbezzilling, pawning, selling or detaining any silk delivered them to wind, double or work up, or after the same is wrought up, and of the Buyers, Receivers or Persons taking to pawn any Silk so imbezzilled or purloined:" but that the said provisions shall remain in full force, and the penalties and forfeitures to which offenders against the said acts are thereby respectively subjected may be levied, recovered and inflicted, in the same manner as such penalties and forfeitures might have been levied, recovered and inflicted before the making of this act; anything herein contained to the contrary thereof in anywise notwithstanding.

None to be punished twice for the same offence.

11. Provided nevertheless, and it is hereby further enacted and declared, that no person shall, by virtue of the said acts hereinbefore last mentioned, or of this act, suffer or be liable to suffer the punishments thereby inflicted twice for one and the same fact or offence.

Recital of several clauses in an act of 12 Geo. 1, c. 34.

12. And whereas by an act made in the twelfth year of the reign of his late Majesty King George the First, intituled, "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages," all contracts, covenants or agreements, and all by-laws, ordinances, rules or orders, made or entered into or hereafter to be made or entered into, by or between any persons brought up in or professing, using or exercising the art and mystery of a wooll comber, or weaver or journeyman wooll comber, or journeyman weaver, in any parish or place within this kingdom, for regulating the said trade or mystery, or for regulating or settling the prices of goods, or for advancing their wages, or for lessening their usual hours of work, are declared to be illegal, null and void to all intents and purposes: and it is by the said last mentioned act (amongst other things) enacted, that if any wooll comber or weaver or journeyman wooll comber, or journeyman weaver or other person concerned in any of the woollen manufactures of this kingdom, shall at any time keep up, continue, act in, make, enter into, sign, seal or be knowingly concerned in any contract, covenant or agreement, by-law, ordinance, rule or order of any club, society, or combination by the said act declared to be illegal, or shall presume or attempt to put any such illegal agreement, by-law, ordinance, rule or order in execution, every person so offending, being thereof lawfully convicted in manner prescribed by the said act, shall, at the discretion of the justices of the peace before whom such conviction shall be had, be committed either to the house of correction, there to be kept to hard labour for any time not exceeding three months, or to the common gaol of the county, city, town or place where such offence shall be committed, there to remain without bail or mainprize for any time not exceeding three months: And it is by the said last mentioned act also further enacted, that if any person retained or employed as a wooll comber or weaver, or servant in the art or mystery of a wooll comber or weaver, shall depart from his service before the end of the time for which he is hired or retained, or shall quit or return his work before the same shall be finished according to agreement, unless it be for some reasonable cause, to be allowed by two or more justices of the peace within their respective jurisdictions, every person so offending, being thereof convicted in manner prescribed by the said act, shall be committed to the house of correction, there to be kept to hard labour for any time not exceeding three months; and if any wooll comber, weaver, servant or person

hired, retained or employed in the said art or mystery, shall wilfully damnify, spoil, or destroy (without the consent of the owner) any of the goods, wares or work committed to his care or charge, or wherewith he shall be entrusted, such offender being thereof convicted shall forfeit and pay to the owner or owners of such goods or wares so damnified, spoiled or destroyed, double the value thereof, to be levied by distress and sale of the offender's goods and chattels, by warrant or warrants under the hands and seals of any two or more justices of the peace within their respective jurisdictions; and for want of sufficient distress such justices shall commit the party or parties offending to the house of correction, there to be kept to hard labour for any time not exceeding three months or until satisfaction be made to the party or parties aggrieved for the same: And it is by the said last mentioned act also further enacted, that every clothier, serge maker, or woollen or worsted stuff maker, or persons concerned in making any woollen cloths, serges or stuffs, or concerned in employing wooll combers, weavers or other labourers in the woollen manufactory, shall pay to all persons by them employed in the woollen manufacture the full wages, or other price agreed on, in good and lawful money of this kingdom, and shall not pay the said wages, or other price agreed on, or any part thereof, in goods or by way of truck, or in any other manner than in money, or make any deduction from such wages or price for or on account of any goods sold or delivered previous to such agreement, by any person or persons whatsoever; and for the more easy recovery of the said wages, or price agreed on, any two or more justices of the peace, within their respective jurisdictions, are authorized and required, upon complaint made for that purpose, to summon before them the party or parties offending, and for non-payment of such wages, or price agreed on, in money as aforesaid, or sufficient satisfaction given for the same, to the good liking of the party or parties aggrieved, to issue their warrant or warrants under their hands and seals, for levying such wages or price due as aforesaid by distress and sale of the offender's goods and chattels, rendering the overplus to the owner; and for want of sufficient distress, to commit the party or parties offending to the common gaol of the county, city, town or place where such offence shall be committed, there to remain without bail or mainprize for the space of six months, or until he, she or they shall pay such wages or price agreed on, in money as aforesaid, or give full satisfaction for the payment of the same, to the good liking of the party grieved: And it is by the said last mentioned act also further enacted, that if any clothier, serge maker, woollen or worsted stuff maker, or person concerned in making any woollen cloths, serges or stuffs, or any way concerned in employing wooll combers, weavers or other labourers in the woollen manufactory, shall pay any person or persons employed by them their wages, or other price agreed on, or any part thereof, either in goods, or by way of truck, or in any other manner than in money, every person so offending shall also forfeit and pay the sum of ten pounds, one moiety thereof to the informer, and the other moiety to the party or parties aggrieved, to be levied by distress and sale of the offender's goods as aforesaid, rendering the overplus (if any be) to the owner: And it is by the said last mentioned act also provided, that it shall be lawful for any person aggrieved by any order or orders to be made by any two or more justices of the peace as aforesaid, to appeal to the justices of the peace at the next general quarter sessions to be holden for the county, city, division, parish or place where such order shall be

made, giving reasonable notice of such appeal, the reasonableness of which notice shall be determined by the justices at the quarter sessions to which such appeal is made; and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same; and the justices who in the general quarter sessions shall hear the matter shall have power to award reasonable costs to either party, as to them shall seem just: And it is by the said last mentioned act also further enacted, that if any person or persons shall assault or abuse any master wooll comber, master weaver, or other person concerned in any of the woollen manufactures, whereby any such master or other person shall receive any bodily hurt for not complying with, or not conforming or not submitting to any such illegal by-laws, ordinances, rules or orders aforesaid; or if any person or persons shall write or cause to be written, or knowingly send or cause to be sent, any letter or other writing or message, threatening any hurt or harm to any such master wooll comber or master weaver, or other person concerned in the woollen manufacture, or threatening to burn, pull down, or destroy any of their houses or out-houses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle, for not complying with any demands, claims or pretences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal by-laws, ordinances, rules or orders as aforesaid, every person so knowingly and willingly offending in the premisses, being thereof lawfully convicted, upon any indictment to be found within twelve calendar months next after any such offence committed, shall be adjudged guilty of felony, and shall be transported for seven years to some or one of his Majesty's colonies or plantations in America, by such ways and means, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported: And whereas it is necessary that the said several provisions and regulations in the said last in part recited act should be extended to journeymen dyers, journeymen hot pressers, and all other persons employed in the woollen manufactures of this kingdom, and also to journeymen, servants, workmen and labourers employed in the making of felts or hats, and in the manufactures of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron, and leather, or any manufactures made up of wooll, furr, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another; be it therefore enacted by the authority aforesaid, that the said several before recited clauses in the said act made in the twelfth year of his said late Majesty's reign, and all the provisions, regulations, pains, penalties and forfeitures therein contained, shall, from and after the said twenty-fourth day of June, one thousand seven hundred and forty-nine, extend, and be construed, deemed, and adjudged to extend to journeymen dyers, journeymen hot pressers, and all other persons whatsoever employed in or about any of the woollen manufactures of this kingdom, and also to journeymen, servants, workmen and labourers, and all other persons whatsoever employed in the making of felts or hats, or in or about any of the manufactures of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron or leather, or in or about any manufactures made up of wooll, furr, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, in as full and ample manner as the said provisions, regulations, pains, penalties and forfeitures, are by the said last mentioned act declared to extend to the several and re-

The provisions and regulations in the clauses of the recited act to extend to persons employed in the manufactures herein enumerated.

spective persons therein named; and the pains, penalties and forfeitures which shall be incurred by reason of any offence committed against the said last mentioned act, by any person or persons employed or concerned in or about any of the said manufactures hereinbefore enumerated, shall be inflicted, levied and recovered in the same manner as the pains, penalties and forfeitures contained in the said last in part recited act are directed to be inflicted, levied and recovered upon and against the several and respective persons therein mentioned (*c*). Penalties and forfeitures to be inflicted and levied as in the said act is directed.

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17 GEO. 3, c. 56.

An Act for amending and rendering more effectual the several Laws now in being, for the more effectual preventing of Frauds and Abuses by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, *Fustian,* Cotton, *Iron, Leather, Fur, Hemp,* Flax, Mohair, and Silk (*d*) *Manufactures; and also for making Provisions to prevent Frauds by Journeymen Dyers.*

Whereas by an act made in the twenty-second year of the reign of his late Majesty King George the Second (intituled "An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures; and for preventing unlawful Combinations of Journeymen Dyers and Journeymen Hotpressers, and of all Persons employed in the said several Manufactures, and for the better Payment of their Wages"), it was enacted, that if any person or persons whatsoever, who should be hired or employed to make any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair or silk manufactures, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, should, from and after the twenty-fourth day of June one thousand seven hundred and forty-nine, purloin, embezzle, secrete, sell, pawn, exchange or otherwise unlawfully dispose of any of the materials with which he, she or they should be respectively intrusted, whether the same or any part thereof be or be not first wrought, made up, manufactured or converted into merchantable wares, and should be thereof lawfully convicted in manner therein mentioned, before any one or more justice or justices of the peace of the county, riding, division, city, liberty, town or place where such offence should be committed, or where the person or persons so charged should reside or inhabit, it should and might be lawful to and for the said justice or justices, by warrant under his or their Recital of 22 Geo. 2, c. 27, s. 1.

(*c*) So much of this section as relates to combinations of workmen, &c., is repealed, 6 Geo. 4, c. 129 (*ante*, p. 352); so much as creates a felony is repealed by 9 Geo. 4, c. 31 (*ante*, p. 280); and so much as relates to the payment of wages in goods, by 1 & 2 Will. 4, c. 36. See 1 & 2 Will. 4, c. 37, *post*, as to wages.

(*d*) Repealed as to woollen, linen, cotton, flax, mohair and silk *manufactures*, 6 & 7 Vict. c. 40, *post*; and see *R.* v. *Button*, 11 Q. B. 941.

hand and seal or hands and seals, to commit the person or persons so convicted to the house of correction or other public prison of such county, riding, division, city, liberty, town or place, there to be kept to hard labour for the space of fourteen days, and also to order the person or persons so convicted to be once publicly whipped at the market place or some other public place of the city, town or place where such offender or offenders should be respectively committed; and in case of a further conviction, in manner before prescribed by the said act, for or upon a second or other subsequent offence of the same kind, it should and might be lawful to and for the justice or justices before whom such conviction should be had to commit the person or persons so again offending to the house of correction or other public prison as aforesaid there to be kept to hard labour for any time not exceeding three months, nor less than one month, and also to order the person or persons so again offending to be publicly whipped at the market place or some other public place of the city, town or place where such offender or offenders should be respectively committed, twice or oftener, as to such justice or justices should appear reasonable; and whereas it is thought necessary to vary the punishment for the offences hereinbefore recited; be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of July one thousand seven hundred and seventy-seven so much of the said recited act as prescribes what the punishment shall be in any of the cases before mentioned, or before whom such conviction shall be had, whether for a first offence or a second or any subsequent offence, shall be repealed; and instead of inflicting the punishment so directed the justices of the peace before whom the conviction shall be shall commit the person convicted to the house of correction or other public prison, there to be kept to hard labour, in the case of a first offence, for any time not less than fourteen days nor more than three months, and in the case of a second or any subsequent offence, for any time not less than three months nor more than six months, and may likewise, for the first or for any subsequent offence, order the person convicted to be once publicly whipped, if such additional punishment shall by the said justice or justices be deemed proper.

So much of the said act as prescribes the punishment to be inflicted for embezzling, pawning, &c., of materials, is hereby repealed;

and other punishments substituted instead thereof.

2. Provided always, and be it further enacted by the authority aforesaid, that no person or persons who shall be charged with any offence or offences against the said recited act of the twenty-second year of the reign of his late Majesty King George the Second, shall be liable to be convicted unless before two or more justices of the peace for the county, riding, division, city, liberty, town or place where the offence shall be committed; anything contained in the said recited act to the contrary hereof notwithstanding.

No person to be convicted, unless before two justices, &c.

3. And whereas by the said act of the twenty-second year of the reign of his late Majesty King George the Second it was also enacted, that if any person or persons should buy, receive, accept or take, by way of gift, pawn, pledge, sale or exchange, or in any other manner whatsoever, of or from any person or persons hired or employed to make any felt or hat, or to prepare or work up the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair or silk manufactures, or any manufactures made up of wool, fur, hemp, flax, cotton, mohair or silk, or of any of the said materials mixed one with another, any thrums or ends of yarn, or any other materials of wool, fur, hemp, flax, cotton or iron, or any leather,

Recital of 22 Geo 2, c. 27, s. 2.

mohair or silk, whether the same or any part thereof be or be not first wrought, made up or manufactured, knowing the person or persons of whom he, she or they so buy, receive, accept or take, the said materials to be so hired or employed as aforesaid, and not having first obtained the consent of the person or persons so hiring or employing him, her or them, who should offer to sell, pawn, pledge, exchange or otherwise dispose of the said materials, or should buy, receive, accept or take, in any manner whatsoever, of or from any other person or persons whomsoever, any of the said materials, whether the same be or be not first wrought, made up or manufactured, knowing the same to be so purloined or embezzled, then and in every such case the person or persons so buying, receiving, accepting or taking any such materials, being thereof lawfully convicted in manner before prescribed by the said act for the conviction of persons purloining or embezzling the said materials, should for the first offence forfeit the sum of twenty pounds, and in case the said forfeiture should not be immediately paid, the justice or justices before whom such conviction should be had should commit the party or parties so convicted to the house of correction or other public prison as aforesaid, there to be kept to hard labour for the space of fourteen days, unless the said forfeiture should be sooner paid; and if within two days before the expiration of the said fourteen days the said forfeiture should not be paid, the said justice or justices is and are thereby empowered and required to order the person or persons so convicted to be publicly whipped at the market place, or some other public place of the city, town or place where such offender or offenders should be respectively committed, once or oftener, as to such justice or justices should appear reasonable; and in case of a further conviction for or upon a second or any other subsequent offence of the same kind, the person or persons so again offending, being thereof convicted in manner before prescribed by the said act, should for every second or other subsequent offence forfeit the sum of forty pounds; and in case the said forfeiture should not be immediately paid, the justice or justices before whom such conviction should be had should commit the party or parties so convicted to the house of correction or other public prison as aforesaid, there to be kept to hard labour for any time not exceeding three months nor less than one month, unless the said forfeiture should be sooner paid; and if within seven days before the expiration of the time for which such offender or offenders should be so committed the said forfeiture should not be paid, the said justice or justices is and are thereby empowered and required to order such offender or offenders to be publicly whipped at the market place, or some other public place of the city, town or place where he, she or they should be respectively committed, twice or oftener, as to such justice or justices should appear reasonable; and the said respective forfeitures of twenty pounds and forty pounds, when recovered, after satisfaction should have been made thereout to the party or parties injured, together with such costs of prosecution as should be judged reasonable by the justice or justices before whom such conviction should have been had, should be equally distributed amongst the poor of the parish or place where the person or persons so convicted should reside or inhabit: And whereas it is thought necessary to increase the pecuniary penalties directed by the said recited act for the said offences last mentioned, and to vary the application of the said penalties for the same, and further to change the consequences of non-payment; be it therefore further enacted, that from and after the said first day of July one thousand seven hun- So much of the said act

as orders the punishment for buying, receiving, &c., of any goods in the last recited clause mentioned repealed; and other punishments substituted instead thereof.

dred and seventy-seven, so much of the said recited act of the twenty-second of his late Majesty King George the Second as enacts what the penalty or punishment shall be for such buying, receiving, accepting, or taking by way of gift, pawn, pledge, sale or exchange, or in any other manner as is described by the said act in the terms aforesaid, and how such penalty shall be applied, and what punishment shall be inflicted in case of non-payment, shall be repealed; and instead thereof the penalty for the first offence shall be any sum not more than forty pounds nor less than twenty pounds, as the justices before whom the conviction shall be shall judge to be most proper; and every such pecuniary penalty shall be applied, under the direction of the justices before whom the conviction shall be, in manner following; (that is to say), in the first place, the expences of the prosecution shall be thereout defrayed, and then such satisfaction shall be made thereout to the party or parties injured as the said justices shall think proper, and afterwards so much of the said penalty shall be paid to the informer or informers as such justices shall think fit, not exceeding in any case ten pounds, and the remainder, if any, shall be paid and distributed to and amongst the poor of the parish, town or place where the conviction shall be, or for the use of such public charity or charities as such justices shall appoint (*d*); and if such pecuniary penalty as aforesaid shall not be paid on conviction, the said justices shall commit the person convicted to the house of correction or other public prison, there to be kept to hard labour for any time not more than six months nor less than three months, as the said justices shall think fit to direct, unless such pecuniary penalty shall be sooner paid; or the said justices may send the person convicted to the house of correction or other public prison, there to remain for three days, exclusive of the day of commitment, with an order that within the said time the person so convicted shall be once publicly whipped at such market place, or other public place as aforesaid.

How justices to proceed when offenders are brought before them for a second offence.

4. And be it further enacted by the authority aforesaid, that from and after the first day of July, one thousand seven hundred and seventy-seven, if any person or persons shall be brought before any justices of the peace, and shall be charged upon oath or (being of the people called Quakers) upon solemn affirmation of having been guilty of buying, receiving, accepting or taking, by way of gift, pawn, pledge, sale or exchange, or in any other manner as is described by the said recited act, in the terms aforesaid, and it shall appear to such justices that the person or persons so charged hath or have been already convicted of the like offence for which he, she or they is or are then charged, that then such justices shall not proceed to convict such person or persons, but shall commit him, her or them to the house of correction or some other public prison, there to remain until the next general or general quarter sessions of the peace to be held in and for the county, riding, division, city, liberty, town or place where the offence shall have been committed, or until such offender or offenders shall have entered into a recognizance to answer for such offence at the said next general or general quarter sessions; and the justices in such general or general quarter sessions are hereby authorized and required to take cognizance thereof, and to

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(*d*) As to the distribution of the penalty, see now 58 Geo. 3, c. 51, which applies to this act, although therein erroneously referred to as having been passed in the *thirteenth* year of Geo. 3. See *R.* v. *Wilcock*. 7 Q. B. 317; *In re Boothroyd*, 15 M. & W. 1.

hear and determine the same; and if such person shall be convicted upon the oath or (being of the people called Quakers) upon the affirmation of one or more credible witness or witnesses, the person so convicted shall forfeit and pay for such offence any sum not more than one hundred pounds nor less than fifty pounds, as the said justices shall judge to be most proper; and every such penalty shall be applied and disposed of, under the direction of the said justices in their general or general quarter sessions, in such manner and proportions as the penalty hereinbefore imposed for the first offence of the like nature is by this act directed to be applied and disposed of; and if such penalty shall not be paid on conviction the said justices shall commit the person so convicted to the house of correction or other public prison, there to be kept to hard labour for any time not more than six months nor less than three months, as the said justices shall, in their discretion, think fit, unless such penalty shall be sooner paid, or the said justices may send the person convicted to the house of correction or other public prison, there to remain for three days, exclusive of the day of commitment, with an order that within the said time such person shall be once publicly whipped at such market place or other public place as aforesaid.

Any such offender convicted before the quarter sessions shall forfeit from 50*l.* to 100*l.*, or be committed, &c.

5. And whereas many frauds are practised in respect to such materials as aforesaid, by persons who sell them knowing them to have been purloined or embezzled; be it therefore further enacted, that after the said first day of July, one thousand seven hundred and seventy-seven, if any person shall sell, pawn, pledge, exchange or otherwise unlawfully dispose of, or offer to sell, pawn, pledge, exchange or otherwise unlawfully dispose of, any such materials as aforesaid, whether wrought or unwrought, mixed or unmixed, knowing them to have been purloined or embezzled, every such person lawfully convicted shall be liable to the same punishment as he or she would be liable to by virtue of this act on being convicted of receiving purloined or embezzled materials knowing them to have been purloined or embezzled.

Persons selling, pawning, &c., any such materials as aforesaid, knowing them to have been embezzled, shall be liable to the same punishment as for receiving embezzled materials.

6. And whereas such materials as aforesaid which have been purloined or embezzled are frequently received by persons knowing the same to have been so purloined or embezzled, and such materials being afterwards worked up or otherwise disposed of renders it difficult to convict such offenders; be it therefore enacted by the authority aforesaid, that from and after the said first day of July, one thousand seven hundred and seventy-seven, when any person or persons shall be brought or charged upon oath before any two or more justices of the peace, by virtue of this act, with being suspected of or with having purloined or embezzled or with having received any such materials as aforesaid, whether the same be wrought or unwrought, mixed or unmixed, knowing the same to have been either purloined or embezzled or received from some person or persons not entitled to dispose thereof, and it shall be made appear upon the oath or (being of the people called Quakers) upon the affirmation of one or more credible witness or witnesses, to the satisfaction of such justices, that such person or persons hath or have purloined or embezzled or hath or have received any such materials as aforesaid, knowing the same to have been purloined or embezzled or received from some person or persons not entitled to dispose thereof, it shall and may be lawful for such justices, or for the justices at their general or general quarter sessions of the peace, and they are hereby respectively authorized and empowered (if they shall think fit) to convict such person or persons of having purloined or embezzled or of having received such materials as aforesaid, knowing the same to

How justices to proceed in relation to persons charged on oath with being suspected of having embezzled such materials, or of having received the same knowing them to have been embezzled, &c.

have been purloined or embezzled or received from some person or persons not entitled to dispose thereof, although no proof shall be given to whom such materials belong; and the person or persons so convicted shall for every such offence be subject to such and the like penalties and punishments, at the discretion of such justices respectively, as persons convicted of buying or receiving any such materials as aforesaid, knowing the same to have been purloined or embezzled, are by this act subject and liable to (*e*).

22 Geo. 2, c. 27, s. 7, recited and altered.

7. And whereas by the said recited act of the twenty-second of King George the Second it was also enacted, that if any person or persons intrusted with any of the materials therein and hereinbefore mentioned, in order to prepare, work up or manufacture the same, should not use all such materials in the preparing, working up or manufacturing of the same, and should neglect or delay, for the space of twenty-one days after such materials should be prepared, worked up or manufactured, to return (if required by the owner or owners of such materials so to do) so much of the said materials as should not be used as aforesaid, to the person or persons intrusting him, her or them therewith, such neglect or delay should be deemed a purloining or embezzling of such materials; and the person or persons so neglecting or delaying, being thereof convicted in manner thereinbefore prescribed for the conviction of offenders against the said act should suffer the like punishment as persons convicted of purloining or embezzling any of the materials thereinbefore mentioned are by the said act rendered subject and liable to: And whereas the space of twenty-one days allowed by the said recited act is thought too long a time to be allowed for returning the said materials, under the circumstances, and in manner aforesaid, and it may be proper to make the punishment for not returning such materials the same as for purloining or embezzling, under this act; be it therefore further enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven so much of the said recited act as allows twenty-one days after the preparing, working up or manufacturing the said materials, for returning so much of the said materials as shall not be used in such preparing, working up or manufacturing, and declares that the punishment for not so returning the said materials within the said time shall be the same as under the said act is directed for purloining or embezzling, shall be repealed, and only eight days shall be allowed for returning the said materials in manner aforesaid, and the punishment for not returning them within the said eight days shall be the same as is by this act directed to be inflicted for purloining or embezzling.

22 Geo. 2, c. 27, s. 9, recited and repealed.

8. And whereas by the said act of the twenty-second year of the reign of his late Majesty King George the Second it is enacted, that, from and after the said twenty-fourth day of June one thousand seven hundred and forty-nine, if any person who should be hired, retained or employed to prepare or work up any of the manufactures thereinbefore mentioned, for any one master, should neglect or refuse the performance thereof, by procuring or permitting himself or herself to be subsequently retained or employed by any other master or person whatsoever, before he or she should have completed the work which he or she was first and originally so hired, retained, or employed to perform, and which was first delivered to him or her, then

(*e*) A conviction under this act for embezzling materials, although confirmed on appeal, cannot be removed by *certiorari*, that writ being taken away by sect. 22. See *R.* v. *Cook*, 1 Dowl., N. S. 300.

and in every such case the person so offending, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before one or more justice or justices of the peace of the county, riding, division, city, liberty, town or place where the offence or offences should be committed, should be sent to the house of correction, there to be kept to hard labour for any time not exceeding one month: And whereas the said provision contained in the said recited clause is not found sufficient for the purpose intended, and it is apprehended that some other provision more proper may be made; be it therefore further enacted, that from and after the said first day of July one thousand seven hundred and seventy-seven the whole of the said last recited clause shall be repealed; and that from and after the said first day of July one thousand seven hundred and seventy-seven, if any person being hired, retained or employed to prepare or work up any materials, whether mixed or unmixed, for any master or masters, shall wilfully neglect or refuse the performance thereof for eight days successively, or having taken in any materials, whether mixed or unmixed, for manufacture, from one master, or two or more masters being co-partners, shall afterwards take in any materials, whether mixed or unmixed, for manufacture, from any other master or masters, or shall procure or permit himself or herself to be employed or retained in any other occupation or employment whatsoever sooner than eight days before the completion of the work first taken, then and in every such case such person, being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before two or more justices of the peace of the county, riding, division, city, liberty, town or place where the offence or offences shall be committed, shall be sent to the house of correction or other public prison, there to be kept to hard labour for any time not exceeding three months nor less than one month.

Any person being employed to work up materials, who shall neglect to perform the same for eight days, &c., shall be sent to the house of correction.

9. And whereas it frequently happens that persons receive the said materials in fictitious names, in order to be manufactured, and that persons receive such materials in their own names, in order to be manufactured by themselves, and afterwards deliver the same to others to be manufactured, without the knowledge or consent of the owners thereof, and that carriers, or other persons employed to deliver materials to workmen to be prepared or manufactured, do designedly deliver such materials to other persons than those intended by the owners of such materials; be it therefore further enacted by the authority aforesaid, that from and after the said first day of July, one thousand seven hundred and seventy-seven, if any person shall receive any of the aforesaid materials in a fictitious name, in order to be manufactured, or if any person shall receive in his or her own name any of the said materials, in order to be manufactured by himself or herself, and afterwards deliver the same, or any part thereof, to any other person, to be manufactured (without the consent of the owner thereof), or if any carrier, or other person employed to deliver any such materials to any workman, to be prepared or wrought up, shall designedly deliver the same to any other person than the person to whom such materials were ordered or intended to be delivered by the owner thereof, all and every person and persons offending in any of the cases aforesaid shall for every such offence be liable to prosecution, in the same manner and to the same punishment as is by this act directed in respect to persons taking in any of the said materials, in order to work up, and afterwards wilfully neglecting or refusing the performance of their work for the space of time aforesaid.

If any person shall receive any materials to be manufactured in a fictitious name, or shall deliver the same to any other person without the consent of the owner, &c., he shall be liable to the same punishment as persons neglecting to perform their work, &c.

10. And whereas it frequently happens that materials used in the

Justices, on

receiving complaint on oath that embezzled materials are suspected to be concealed in any house, &c., may grant a warrant for searching the same, and persons in whose possession such materials shall be found, guilty of misdemeanor.

manufactures before mentioned are found or known to be concealed in the possession of persons who have received the same, knowing them to be purloined or embezzled, or of persons known not to be entitled to dispose of the same: And whereas the discovery and conviction of the purloiners and embezzlers, buyers and receivers of such materials, is full of difficulty, from the close and clandestine manner in which the offence is committed, and there is still greater difficulty in proving whose property such materials are; and it would tend to the discouragement and suppression of such offences if the discovery and conviction of such offenders were rendered more easy: And whereas by the said recited act of the twenty-second year of his late Majesty King George the Second, justices of the peace, after conviction of any offender for purloining or embezzling the said materials, or for buying or receiving the same, are authorized to grant warrants for searching the houses and other places of the persons so convicted, but no such authority is given before conviction, nor in any other house or place except such as belongs to a person convicted; be it therefore further enacted, that it shall and may be lawful for any two (*f*) justices of the peace of any county, riding, division, city, liberty, town or place, upon complaint made to them upon oath by any one credible person, or (being of the people called Quakers) upon solemn affirmation, that there is cause to suspect that any such purloined or embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling-house, outhouse, yard, garden or other place (*g*) or places, by virtue of a warrant under their hands and seals (*h*), to cause every such dwelling-house, outhouse, yard, garden or place to be searched in the daytime, and if any such materials suspected to be purloined or embezzled shall be found therein, to cause the same, and the person or persons in whose house, outhouse, yard, garden or other place the same shall be found, to be brought before any two (*i*) justices of the peace for the same county, riding, division, city, liberty, town or place, and if the said person or persons shall not give an account to the satisfaction of such justices how he, she or they came by the same, then the said person or persons so offending shall be deemed and adjudged guilty of a misdemeanor, and shall be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong (*k*).

(*f*) If the complaint is made to different justices from those who determine it, the conviction should state that, as required by 3 Geo. 4, c. 23, s. 2; a conviction which omitted such statement was quashed, *R.* v. *Wilcock*, 7 Q. B. 317.

(*g*) A "warehouse" of a silk dealer and manufacturer upwards of a mile and a half from his dwelling-house, is a "place" within the meaning of this section, *R.* v. *Edmundson*, 28 L. J., M. C. 213; *S. C.* 33 Law Times Rep. 237.

(*h*) A search warrant under this section is necessary to justify *entering a house* to search for embezzled materials; *Davis* v. *Nest*, 6 C. & P. 167. But in trespass for breaking and entering the house of A., and taking his woollen yarn, the defendant may, under not guilty, show a condemnation of the yarn under this statute; as that shows that A. could have no property in it; *ib.*

(*i*) See note (*f*) *supra.*

(*k*) In a conviction under this section it is not necessary to state the ownership of the goods, *In re Boothroyd*, 15 M. & W. 1; and see *ibid.* as to distribution of penalty. As to an indictment for perjury committed by exhibiting false information under this section, see *R.* v. *Goodfellow*, Carr. & M. 569.

11. And be it further enacted, that every peace officer, constable, headborough or tythingman in every county, city, town corporate or other place where there shall be officers, and every beadle within his ward, parish or district, and every watchman, during such time only as he is on his duty, shall and may apprehend or cause to be apprehended all and every person or persons who may reasonably be suspected of having or carrying or any ways conveying, at any time after sunsetting and before sunrising, any of such materials suspected to be purloined or embezzled, and the same, together with such person or persons, as soon as conveniently may be, convey or carry before any two justices of the peace for the county, riding, division, city, liberty, town or place within which the suspected person or persons shall be apprehended; and if the person or persons so apprehended in conveying any such materials shall not produce the party or parties, duly entitled to dispose thereof, from whom he, she or they bought or received the same, or some other credible witness, to testify upon oath or (being of the people called Quakers) upon solemn affirmation to the sale or delivery of the said materials (which oath or affirmation respectively such justices are hereby empowered to administer) or shall not give an account, to the satisfaction of such justices, how he, she or they came by the same, then the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong.

Peace officers in towns corporate, &c., may apprehend all persons suspected of having, or carrying after sunset, any materials suspected to be purloined, &c.

12. Provided always, and be it further enacted, that in either of the two cases last before mentioned, when any person or persons who shall be brought before any two justices of the peace shall request of such justices to appoint a reasonable time to produce the person or persons, duly entitled to sell or dispose of the same, of or from whom he, she or they bought or received the same, or some one or more credible witness or witnesses to prove the sale or delivery thereof, then and in such case it shall and may be lawful for the said justices, and they are hereby authorized and required to appoint such reasonable time as aforesaid, and to issue out a summons to the constable or other peace officer of the parish or place where such person or persons, or such witness or witnesses, shall respectively reside, requiring him, her or them to appear before two or more justices at such time and place as shall be so appointed by such justices, in order to be examined and give evidence on oath or (being of the people called Quakers) solemn affirmation of the several matters aforesaid; but such person or persons, at the time of making such request, shall enter into a recognizance, with or without surety or sureties, as such justices shall think proper, for his, her or their appearance before them at the time so to be set, or, for want of such recognizance as aforesaid, shall be committed until the time that shall be set or appointed by the said justices for the appearance of such party or parties, witness or witnesses; and if at such appointed time such person or persons shall be convicted of any of the offences aforesaid (*l*), then and in such case he, she or they shall suffer such punishment as is hereinbefore directed to be inflicted on persons guilty of such offences.

Justices may, at the request of persons brought before them, appoint a reasonable time to produce the persons entitled to dispose of the materials, &c., on the persons making such request entering into a recognizance, &c.

(*l*) A conviction which stated that A. B. was convicted before the magistrates upon the oath of T. J., a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c., he not producing the party from whom he bought the same or giving a satisfactory account; and then going on to adjudicate, was held good in *Davis* v. *Nest*, 6 C. & P. 167.

On any person being convicted of a misdemeanor, as aforesaid, the materials so found shall be deposited in the hands of the churchwardens, &c.;

13. And be it further enacted, that where any person or persons shall be convicted of a misdemeanor in either of the two cases last before mentioned, it shall and may be lawful for the justices before whom the conviction shall be to cause the said materials so found or seized as aforesaid to be deposited in the hands of the churchwardens or overseers of the poor of the place where such materials shall be found or seized, or in any other convenient place, for any time not exceeding thirty days, and in the mean time to order the said churchwardens and overseers of the poor, or one of them, to insert an advertisement in some one or more of the public newspapers usually published or circulated in or near such place, or otherwise to cause notice to be given by some public crier, and by fixing on the church or chapel door notice describing such materials, and where the same are so deposited, to the end that persons having lost such materials, or any reputable person or persons in their behalf, may come and claim the same; and in case any person or persons can prove his, her or their property in the said materials upon oath, or (being of the people called Quakers) upon his, her or their solemn affirmation, to the satisfaction of any two justices of the peace for such county, riding, division, city, liberty, town or place, then such justices shall order restitution of such materials to the owner or owners thereof, after paying the reasonable charges of removing, depositing and giving public notice of the same; but if before the end of the said thirty days no person or persons shall come and prove his, her or their property in such materials, nor any reputable person or persons on his, her or their behalf, then the said justices shall order and direct the same to be sold for the best price that can reasonably be had, and after deducting such charges as aforesaid, together with the charges of sale, one moiety of the money arising from such sale shall be given to the person or persons, or either of them, who shall apprehend or prosecute the offender or offenders guilty of either of the misdemeanors aforesaid, as the said justices shall appoint, and the other moiety thereof, either to and amongst the poor of the parish, town or place where the conviction shall be, or to such public charity or charities as the justices convicting shall appoint.

and if any person can prove his property in the said materials, they shall be delivered to him, on paying the charges of removing, &c., but if no person prove his property in them, they shall be sold, &c.

Penalty on persons having in their possession materials suspected to be purloined, &c.

14. And be it further enacted, that every person deemed and adjudged guilty of a misdemeanor, in having in his or her possession any materials suspected to be purloined or embezzled, and not producing the party or parties, being duly entitled to dispose of the same, of whom he or she bought or received the same, nor giving a satisfactory account how he or she came by the same, or of a misdemeanor in having, carrying or conveying of the said materials suspected to be purloined or embezzled, and not producing the party or parties, being duly entitled to dispose of the same, of whom he or she bought or received the same, nor any credible witness to testify upon oath, or (being of the people called Quakers) upon solemn affirmation, the sale or delivery thereof, nor giving a satisfactory account how he or she came by the same (as the case shall be), shall for every such misdemeanor forfeit, for the first offence, the sum of twenty pounds, and for the second offence the sum of thirty pounds, and for every subsequent offence the sum of forty pounds; all which said respective forfeitures shall and may be levied by distress and sale of the goods and chattels of every such offender (rendering to him or her the overplus after charges of the said distress and sale deducted), by warrant under the hands and seals of the justices before whom such offender shall be deemed and adjudged guilty, of which forfeiture one moiety shall be paid to the

Forfeitures may be levied by distress.

informer, and the other moiety thereof to and amongst the poor of the parish, town or place where such conviction shall be, or to such public charity or charities as the justices convicting shall appoint(*m*); and if no sufficient distress shall be found whereon to levy the said respective forfeitures, then the said justices shall and may commit every such offender so respectively deemed and adjudged guilty as aforesaid to the common gaol or other prison or house of correction within his or their jurisdiction, without bail or mainprize, for the space of one month for the first offence, and for the second offence for the space of two months, and for every subsequent offence for the space of six months.

On failure of distress, offender to be committed.

15. And whereas it sometimes happens, by occasion of the very long detention of such materials as aforesaid, delivered out to journeymen or other persons employed to work up the same, it cannot be known to the master or owners of such materials whether the same may have been purloined or embezzled, or whether the said materials are wholly or in part wrought or begun to be wrought, or in what state or condition such materials may be; for remedy whereof be it further enacted, that from and after the said first day of July, one thousand seven hundred and seventy-seven, it shall be lawful for the owner or owners of any such materials, from time to time, as occasion shall require, to demand entrance, and enter, at all seasonable hours in the daytime, into the shops or outhouses of any person or persons employed by him or them to work up any of the said materials, or other place or places where the work shall be carried on, and there to inspect the state and condition of such materials; and in case of refusal by any such person or persons so employed to permit such entrance or inspection, he, she or they so refusing shall forfeit and pay such sum of money, not exceeding forty shillings nor less than ten shillings, as the justices before whom he, she or they shall be convicted shall think proper, to be recovered and applied in the same manner as is by this act directed for the misdemeanor of being in the possession of any such materials without being able to account satisfactorily for such possession.

Owners of materials delivered to journeymen, &c., to be worked up, may, at all seasonable hours, enter their shops or outhouses, to inspect their materials.

Penalty on refusal of entrance, &c.

16. And whereas the said recited act of the twenty-second year of the reign of his late Majesty King George the Second contains no provision for the protection and recovery of the tools and implements with which any person or persons employed in preparing, working up or manufacturing such materials as aforesaid shall be intrusted for that purpose, nor any provision in respect to the drugs and ingredients used in dyeing, preparing or manufacturing such of the said materials as are usually dyed, prepared or manufactured; be it therefore enacted, that from and after the said first day of July, one thousand seven hundred and seventy-seven, every penalty or punishment directed by or other provision contained in the said recited act in respect to the said materials, so far as the said recited act is not varied by this act, and all the provisions in this act contained in respect to the said materials, shall extend and be applicable to any tool or tools and implement or implements, with which any person or persons shall be intrusted for making, working up or manufacturing the said materials, and also to any drug or drugs, ingredient or ingredients, with which any person or persons shall be intrusted, for the purpose of dyeing, preparing or manufacturing such of the aforesaid materials as are usually dyed, prepared or manufactured,

All penalties in the act 22 Geo. 2, and in this act relating to the said materials, shall be applicable to the tools, &c., with which any person is intrusted for manufacturing the same.

(*m*) As to distribution of the penalty, see *ante*, p. 396, note(*d*).

in the same manner as if the said tools and implements, drugs and ingredients were particularly mentioned both in the said recited act and in the preceding provisions of this act.

If any journeyman dyer, &c., shall, without the consent of his employer, dye any woollen, linen, &c., he shall forfeit, for the first offence, 10*s.*, &c.;

17. And whereas journeymen dyers (*n*), servants and apprentices frequently abuse the trust reposed in them, by dyeing goods for their own profit, without the consent of their masters; be it therefore enacted, that from and after the said first day of July, one thousand seven hundred and seventy-seven, if any person hired, retained or employed as a journeyman dyer, or as a servant or apprentice, in the dyeing of any felt or hat, or any woollen, linen, fustian, cotton, leather, fur, flax, mohair or silk materials, whether the same shall be wrought or unwrought, or shall be mixed or unmixed with other of the said materials, shall, without the consent of the master, person or persons by whom such journeyman, servant or apprentice shall be hired, retained or employed, wilfully dye any of the said materials, whether wrought or unwrought, or mixed or unmixed with other of the said materials, or without such consent shall wilfully receive any such materials as aforesaid, for the purpose of dyeing the same, whether the same shall be dyed or prepared for dyeing, he or she so guilty of either of the said offences shall for the first offence forfeit the sum of ten shillings, and for the second offence the sum of twenty shillings, and for every subsequent offence the sum of forty shillings; or if any person shall procure any such materials as aforesaid to be dyed by any person so hired, retained or employed as a journeyman, servant or apprentice, without the consent of his or her master or employer, or shall offer any such materials to any such journeyman, servant or apprentice, for the purpose aforesaid, he or she so offending being thereof lawfully convicted by the oath or (being of the people called Quakers) affirmation of one or more credible witness or witnesses, before two or more justices of the peace for the county, riding, division, city, liberty, town or place where the offence shall be committed, shall for the first offence forfeit the sum of five shillings, and for the second offence the sum of twenty shillings, and for every subsequent offence the sum of four pounds; and each of the said penalties shall be paid to the informer or informers, and in case of nonpayment on conviction the person so convicted shall be committed by the justices before whom the conviction shall be to the common gaol or house of correction to remain for any time not exceeding one month, as such justice shall order and direct.

or if any person shall procure any such materials to be so dyed, he shall forfeit, for the first offence, 5*s.*, &c.

Inhabitants of any parish wherein any of the aforesaid offences shall be committed to be deemed competent witnesses.

18. Provided always, and be it further enacted, that any inhabitant of any parish, township or place in which any offence shall be committed contrary to the act of the twelfth year of the reign of his late Majesty King George the First, or contrary to the act of the twenty-second year of his late Majesty King George the Second, or contrary to this act, shall be deemed a competent witness, notwithstanding his or her being an inhabitant of such parish, township or place.

(*n*) This act is not repealed as to *dyers* by 6 & 7 Vict. c. 40; see sect. 34, which confines that act to *manufacturers*; see 11 Q. B. 941. Where a dyer permitted his servants to use his dye, &c., for their own materials and such as he entrusted them with, but they made a profit by using them for other materials without his knowledge, and there was no proof of a conspiracy besides the concurrence in that act; it was held, that assuming the act itself to be a larceny, the servants might still be convicted of the conspiracy as a distinct offence, *R.* v. *Button*, 11 Q. B. 929.

Justice of peace, on complaint to him made upon oath of any offence against this act, may issue his warrant for apprehending the offender.

19. And be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any one justice of the peace of any county, riding, division, city, liberty, town or place, and he is hereby required, upon complaint to him made upon oath or (if the person complaining be of the people called Quakers) solemn affirmation, of any offence committed against this act, within the same county, riding, division, city, liberty, town or place, to issue his warrant for apprehending and bringing before any two or more justices of the peace of the same county, riding, division, city, liberty, town or place, the person or persons charged with such offence; and the justices before whom such person or persons shall be brought are hereby authorized and required to hear and determine the matter of such complaint, and to proceed to judgment and conviction thereupon.

Persons aggrieved by the order of any two justices, &c., may appeal to the quarter sessions, giving notice to such justices of their intention to appeal, and entering into recognizance, &c.

20. And whereas the said act of the twenty-second year of the reign of his late Majesty King George the Second only gives appeal from an order of any justice or justices of the peace to the general or general quarter sessions of the peace where an order is made by any justice or justices of the peace in the case of the buyer or receiver of such purloined or embezzled materials as aforesaid, and in respect to the sale or disposal of such materials found on searching by warrant, after any conviction for purloining or embezzling, or for receiving or buying such purloined or embezzled materials; and whereas it is thought more proper to give a right of appealing in the case of other orders of any justice or justices of the peace to be made by force of an act made in the twelfth year of the reign of his late Majesty King George the First (intituled "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages") (*o*), and of the said act, and also in the case of all orders to be made by any justices of the peace under this act; be it therefore further enacted, that if any person shall think himself or herself aggrieved by the order or judgment of any two justices before whom he or she shall have been convicted of any of the offences in the said acts of the twelfth year of the reign of King George the First and the twenty-second year of the reign of King George the Second, or in this act, such person may appeal, and the said justices are hereby required to make known to such person, at the time of such conviction his or her right to appeal (*p*), to the next general or general quarter sessions of the peace to be holden for the county, riding, division, city, liberty, town or place where such conviction shall have been made (such person at the time of such conviction giving to such justices notice in writing of his or her intention to appeal, and also entering into a recognizance, at the time of such notice, with sufficient sureties, conditioned to try such appeal, and to abide the judgment of and pay such costs as shall be awarded by the justices at such sessions); but if the person giving such notice of appeal shall not at the time of giving such notice enter into such recognizance as aforesaid, then the justices to whom such notice of appeal shall have been given shall and may commit such person or persons to the house of correction or other public prison of such county, riding, division, city, liberty, town or place, there to remain until the said next general or

(*o*) As to wages, see 1 & 2 Will. 4, c. 37, *post*.

(*p*) If they make known to a party convicted his right to appeal, and he declines appealing, they need not proceed to inform him of the necessary steps to be taken in order to appeal, *R.* v. *Justices of West Riding of Yorkshire*, 3 M. & S. 494.

general quarter sessions of the peace to be holden in and for such place, unless such recognizance shall be sooner entered into (*q*); and the said justices before whom such conviction shall have been made, or any other two or more justices of the same county, riding, division, city, liberty, town or place, are hereby empowered and required to take, and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable to be paid by either party; and if upon the hearing of such appeal the judgment of the justices before whom the appellant shall have been convicted shall be affirmed, such appellant shall, within forty-eight hours next after the same shall be so affirmed, suffer such corporal punishment as shall have been directed to be inflicted upon him or her for the offence whereof he or she shall have been convicted, or shall immediately pay the sum which he or she shall have been adjudged to forfeit, together with such costs as the justices in the said sessions shall award to be paid by him or her, for defraying the expences sustained by the original judgment of conviction, unless the person or persons so convicted shall have been imprisoned under the original conviction, in which case the time for which such person or persons shall have been so confined shall be included in the order of confirmation.

How the delinquent shall be punished, in case the sessions confirm his conviction.

Part of 23 Geo. 2, c. 13, repealed.

21. And whereas an act passed in the twenty-third year of the reign of his late Majesty King George the Second, (intituled "An Act for the more effectually punishing of Persons convicted of seducing Artificers in the Manufactures of Great Britain or Ireland out of the Dominions of the Crown of Great Britain; and to prevent the Exportation of Utensils made use of in the Woollen and Silk Manufactures from Great Britain or Ireland into Foreign Parts; and for the more easy and speedy Determination of Appeals allowed in certain Cases by an Act made in the last Session of Parliament, relating to Persons employed in the several Manufactures therein mentioned") prescribes a form for conviction of the several offences mentioned in the said recited act of the twenty-second of George the

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(*q*) Where a party convicted under this act gave notice of appeal, and was committed for not entering into recognizances, and by the practice of the sessions the appeal was to be entered and the order for hearing it obtained by the party disputing the conviction; but the party not having entered the appeal the sessions discharged him; *semble*, that the convicting magistrates had no longer power to commit in execution of the conviction; but at any rate no *mandamus* should be granted to compel them to do so; *R.* v. *Twyford*, 5 A. & E. 430; but see *R.* v. *Bolton*, *infra*. A party convicted under sect. 8, entered into recognizance and gave notice of appeal, which he afterwards abandoned. At the sessions, the respondents applied to enter the appeal, and for their costs incurred by not receiving notice of abandonment: held, on motion for *mandamus*, that the Recorder acted properly in refusing both applications, *R.* v. *Recorder of Bolton*, 2 D. & L. 510.

Second, but such form is not adapted to the said last mentioned act as altered by this act; and it may be useful to have one general form for the said recited act of the twenty-second of George the Second and this act; be it therefore further enacted, that in respect to all offences which from and after the said first day of July one thousand seven hundred and seventy-seven shall be committed against the said recited act of the twenty-second of George the Second, so much of the said act of the twenty-third of George the Second as prescribes a form of conviction for offences against the said act of the twenty-second of George the Second shall be repealed; and that from and after the said first day of July one thousand seven hundred and seventy-seven the justices before whom any offender shall be convicted of any offence, either against the said act of the twenty-second of George the Second or varied by this act or against this act, shall cause the conviction to be certified to the next general or general quarter sessions of the peace to be held in and for the county, riding, division, city, liberty, town or place where such conviction was made, to be filed with the records of such sessions; and such convictions shall and may be drawn up and written on parchment, and certified in the following form of words, as far as the name of the person and the nature of the case will admit of (that is to say),

How justices to proceed for conviction of offenders against the said act of 22 Geo. 2, or this act.

'*Middlesex*, (*or any other place, as the case shall be*), to wit. } BE it remembered, that on the day of in the year of our Lord A. B. was convicted before us of his Majesty's justices of the peace in and for the said 'county of *or* for the riding of the said county of *or* 'for the city, liberty, town or place aforesaid, in the said county ' (*as the case shall be*) of [*here specify the offence, and when and where the same was committed*]. Given under our hands 'and seals the day and year first above written.'

Form of conviction (*r*).

22. Provided always, and be it further enacted, that no order made touching or concerning any of the matters in this act contained, or any proceedings to be had touching the conviction of any offender or offenders against the said act of the twenty-second of George the Second, or this act, shall be quashed for want of form, or be removed or removable by certiorari into his Majesty's Court of King's Bench (*s*); and the justices before whom such convictions shall be had shall cause the same, drawn up in the form aforesaid, to be fairly written upon parchment, and transmitted to the next general or general quarter sessions of the peace to be held for the county, riding, division, city, liberty, town or place wherein such conviction was had, to be filed and kept amongst the records of the said general or general quarter sessions; and in case the person or persons so convicted shall appeal from the judgment of the said justices to the said general or general quarter sessions, the justices on such general or general quarter sessions are hereby required, upon receiving the said conviction drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal, according to the direction of the said act, any law or usage to the contrary notwithstanding.

Proceedings not to be quashed for want of form nor removed by *certiorari*.

(*r*) See *R.* v. *Wilcock*, 7 Q. B. 317; *In re Boothroyd*, 15 M. & W. 1; 11 & 12 Vict. c. 43.

(*s*) This section takes away the writ of *certiorari* only from offences for the first time created by 22 Geo. 2, c. 27, and does not apply to those created by 12 Geo. 1, c. 34, and extended to the silk and cotton trades by 22 Geo. 2, c. 27; *R.* v. *Rogers*, 5 B. & Ald. 773. See further 6 & 7 Vict. c. 40, *post*.

This act not to repeal any former law, except as is herein particularly expressed;

23. Provided also, and be it further enacted, that nothing herein contained shall extend or be construed to extend to repeal any former law or laws now in being for the punishment of any of the offences herein above specified, except so far as is particularly expressed by this act; and no offender who shall have been proceeded against upon or by virtue of this act for any of the offences herein specified shall for the same offence be afterwards proceeded against upon or by virtue of any such former law or laws.

nor to extend to any offence committed against the act 22 Geo. 2, before 1st July, 1777.

24. Provided also, and be it further enacted, that nothing contained in this act shall extend to or affect any person or persons for any offence committed or to be committed against the said recited act of the twenty-second year of the reign of his late Majesty King George the Second, before the said first day of July one thousand seven hundred and seventy-seven, but all and every such offender and offenders shall and may be prosecuted and punished in the same manner as if this act had not been made.

Limitation of actions.

25. And be it further enacted, that if any suit or action shall be commenced or prosecuted against any person or persons for anything done or to be done in pursuance of this act, every such suit or action shall be severally brought, laid and tried in the county or place where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, and that the same was done in pursuance of and by the authority of this act; and if it shall appear to be so done, or if any such suit or action shall be brought in any other county or place than where the fact was committed, then the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her or their action after the defendant or defendants shall have appeared, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for the same as any defendant or defendants hath or have for costs in other cases at law.

General issue.

Treble costs.

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42 Geo. 3, c. 73.

An Act for the Preservation of the Health and Morals of Apprentices and others, employed in Cotton and other Mills, and Cotton and other Factories. [22 June, 1802.]

Whereas it hath of late become a practice in cotton and woollen mills, and in cotton and woollen factories, to employ a great number of male and female apprentices, and other persons, in the same building, in consequence of which certain regulations are become necessary to preserve the health and morals of such apprentices and other persons; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same. That, from and after the second day of December, one thousand eight hundred and two, all such mills and factories within Great Britain and Ireland, wherein three or more apprentices, or twenty or more other persons, shall at any time be employed, shall be subject to the several rules and regulations contained

From Dec. 2, 1802, mills and factories employing a certain number of per-

in this act; and the master or mistress of every such mill or factory is hereby strictly enjoined and required to pay due attention to and act in strict conformity to the said rules and regulations.

sons subject to the regulations of this act.

2. And be it enacted, that all and every the rooms and apartments in or belonging to any such mill or factory shall twice at least in every year, be well and sufficiently washed with quick lime and water over every part of the walls and ceiling thereof (*t*); and that due care and attention shall be paid by the master or mistress of such mills or factories, to provide a sufficient number of windows and openings in such rooms or apartments, to insure a proper supply of fresh air in and through the same.

The rooms shall be washed with quick lime and water twice a year, and care shall be taken to admit fresh air.

3. And be it further enacted, that every such master or mistress shall constantly supply every apprentice, during the term of his or her apprenticeship, with two whole and complete suits of cloathing, with suitable linen, stockings, hats and shoes; one new complete suit being delivered to such apprentice once at least in every year.

Apprentices shall be supplied with two complete suits of cloathing, &c.

4. And be it further enacted, that no apprentice that now is or hereafter shall be bound to any such master or mistress, shall be employed or compelled to work for more than twelve hours in any one day (reckoning from six of the clock in the morning to nine of the clock at night), exclusive of the time that may be occupied by such apprentice in eating the necessary meals: provided always, that, from and after the first day of June one thousand eight hundred and three, no apprentice shall be employed or compelled to work upon any occasion whatever, between the hours of nine of the clock at night and six of the clock in the morning (*u*).

Time of working not to exceed twelve hours.

From June 1, 1803, no apprentices to be compelled to work between nine at night and six in the morning.

5. And be it further enacted, that in any mill or factory, wherein not less than one thousand nor more than fifteen hundred spindles are constantly used in the carrying on of the manufacture, it shall and may be lawful for the owner or owners of such mill to employ his apprentices in the night until the twenty-fifth day of December one thousand eight hundred and three; and in any mill or factory wherein more than fifteen hundred spindles shall be employed, it shall and may be lawful for the owner of such mill to employ his apprentices in the night until the twenty-fifth day of June one thousand eight hundred and four; anything herein contained to the contrary notwithstanding.

In mills or factories wherein a certain number of spindles are used, apprentices may be employed in the night till certain periods.

6. And be it further enacted, that every such apprentice shall be instructed, in some part of every working day, for the first four years at least of his or her apprenticeship, which shall next ensue, from and after the second day of December one thousand eight hundred and two, if he or she is an apprentice on the said second day of December one thousand eight hundred and two, and for the first four years at least of his or her apprenticeship, if his or her apprenticeship commences at any time after the said second day of December one thousand eight hundred and two, in the usual hours of work, in reading, writing and arithmetick, or either of them, according to the age and abilities of such apprentice, by some discreet and proper person, to be provided and paid by the master or mistress of such apprentice, in some room or place in such mill or factory to be set apart for that purpose: and that the time hereby directed to be allotted for such instruction as aforesaid, shall be

Apprentices to be instructed every working day for the first four years of his apprenticeship in reading, writing, and arithmetick, &c.

(*t*) See further, 3 & 4 Will 4, c. 103, s. 26; 7 & 8 Vict. c. 15, ss. 18 & 58, *post*.

(*u*) As to time of working, see further 3 & 4 Will. 4, c. 103; 7 & 8 Vict. c. 15; 8 & 9 Vict. c. 29; 10 & 11 Vict. c. 29, *post*; *Ryder* v. *Mills*, 3 Exc. 853; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104, *post*.

deemed and taken on all occasions as part of the respective periods limited by this act during which any such apprentice shall be employed or compelled to work.

Apartments of male and female apprentices to be kept distinct, and two only shall sleep in one bed.

7. And be it further enacted, that the room or apartment in which any male apprentice shall sleep, shall be entirely separate and distinct from the room or apartment in which any female apprentice shall sleep; and that not more than two apprentices shall in any case sleep in the same bed.

Regulations to be observed for the instruction of apprentices on Sundays.

8. And be it further enacted, that every apprentice, or (in case the apprentices shall attend in classes), every such class shall, for the space of one hour at least every Sunday, be instructed and examined in the principles of the Christian religion, by some proper person, to be provided and paid by the master or mistress of such apprentice; and in England and Wales, in case the parents of such apprentice shall be members of the Church of England, then such apprentice shall be taken, once at least in every year during the term of his or her apprenticeship, to be examined by the rector, vicar, or curate of the parish in which such mill or factory shall be situate; and shall also, after such apprentice shall have attained the age of fourteen years and before attaining the age of eighteen years, be duly instructed and prepared for confirmation, and be brought or sent to the bishop of the diocese to be confirmed, in case any confirmation shall, during such period, take place in or for the said parish; and in Scotland, where the parents of such apprentice shall be members of the Established Church, such apprentice shall be taken, once at least in every year, during the term of his or her apprenticeship, to be examined by the minister of the parish; and shall, after such apprentice shall have attained the age of fourteen years, and before attaining the age of eighteen years, be carried to the parish church to receive the sacrament of the Lord's Supper, as the same is administered in churches in Scotland; and such master or mistress shall send all his or her apprentices under the care of some proper person, once in a month at least, to attend during Divine service in the church of the parish or place in which the mill or factory shall be situated, or in some other convenient church or chapel where service shall be performed according to the rites of the Church of England, or according to the established religion in Scotland, as the case may be, or in some licensed place of Divine worship; and in case the apprentices of any such master or mistress cannot conveniently attend such church or chapel every Sunday, the master or mistress, either by themselves or some proper person, shall cause Divine service to be performed in some convenient room or place in or adjoining to the mill or factory, once at least every Sunday that such apprentices shall not be able to attend Divine service at such church or chapel; and such master or mistress is hereby strictly enjoined and required to take due care that all his or her apprentices regularly attend Divine service, according to the directions of this act.

Justices at their Midsummer sessions yearly shall appoint two visitors of such mills or factories, who shall report the condition thereof to

9. And be it further enacted, that the justices of the peace for every county, stewartry, riding, division or place, in which any such mill or factory shall be situated, shall, at the Midsummer sessions of the peace to be holden immediately after the passing of this act for such county, stewartry, riding, division or place, and afterwards yearly at their annual Midsummer sessions of the peace, appoint two persons, not interested in, or in any way connected with, any such mills or factories, to be visitors of such mills or factories in such county, stewartry, riding, division or place; one of whom shall be a justice of peace for such county, stewartry, riding, division or

place, and the other shall be a clergyman of the Established Church of England or Scotland, as the case may be; and in case it shall be found inconvenient to appoint one such justice and one such clergyman as aforesaid, it shall be lawful to and for such justices, and they are hereby required to appoint two such justices, or two such clergymen; and the said visitors, or either of them, shall have full power and authority, from time to time throughout the year, to enter into and inspect any such mill or factory at any time of the day, or during the hours of employment, as they shall think fit; and such visitors shall report from time to time in writing to the quarter sessions of the peace the state and condition of such mills and factories, and of the apprentices therein, and whether the same are or are not conducted and regulated according to the directions of this act and the laws of the realm; and such report shall be entered by the clerk of the peace among the records of the session in a book kept for that purpose: provided always, that in case there shall be six or more such mills or factories within any one such county, riding, division or place, then it shall be lawful for such justices to divide such county, riding, division or place, into two or more districts or parts, and to appoint two such visitors as aforesaid for each of such districts or parts (*v*). the quarter sessions, &c.

10. And be it further enacted, that in case the said visitors or either of them shall find that any infectious disorder appears to prevail in any mill or factory as aforesaid, it shall be lawful for them or either of them to require the master or mistress of any such mill or factory to call in forthwith some physician, or other competent medical person, for the purpose of ascertaining the nature and probable effects of such disorder, and for applying such remedies and recommending such regulations as the said physician, or other competent medical person shall think most proper for preventing the spreading of the infection and for restoring the health of the sick; and that such physician, or other competent medical person, shall report to such visitors, or either of them, as often as they shall be required so to do, their opinion in writing of the nature, progress, and present state of the disorder, together with its probable effects; and that any expenses incurred in consequence of the provisions aforesaid for medical assistance, shall be discharged by the master or mistress of such mill or factory. In case of infectious disorders prevailing, the visitors may require the master to call in medical assistance, &c.

11. And be it further enacted, that if any person or persons shall oppose or molest any of the said visitors in the execution of the powers intrusted to them by this act, every such person or persons shall for every such offence forfeit and pay any sum not exceeding ten pounds, nor less than five pounds (*w*). Penalty for obstructing visitors.

12. And be it further enacted, that the master or mistress of every such mill or factory shall cause printed or written copies of this act to be hung up and affixed in two or more conspicuous places in such mill or factory, and shall cause the same to be constantly kept and renewed, so that they may at all times be legible and accessible to all persons employed therein (*x*). Copies of this act to be affixed in two conspicuous places of such mills or factories.

13. And be it further enacted, that every master or mistress of any such mill or factory who shall wilfully act contrary to or offend against any of the provisions of this act, shall for such offence (except Penalty on masters offending

(*v*) See further, 3 & 4 Will. 4, c. 103, s. 17, *post*, p. 431.

(*w*) See also 3 & 4 Will. 4, c. 103, s. 32; 7 & 8 Vict. c. 15, s. 61; 8 & 9 Vict. c. 29, ss. 41, 42, *post*.

(*x*) See also 3 & 4 Will. 4, c. 103, s. 27; 7 & 8 Vict. c. 15, s. 28; 8 & 9 Vict. c. 29, s. 29, *post*.

against this act.

where otherwise directed) forfeit and pay any sum not exceeding five pounds nor less than forty shillings, at the discretion of the justices before whom such offender shall be convicted as after mentioned; one-half whereof shall be paid to the informer, and the other half to the overseers of the poor in England and Ireland, and to the minister and elders in Scotland, of the parish or place where such offence shall be committed, to be by them applied in aid of the poor rate in England and Ireland, and for the benefit of the poor in Scotland, of such parish or place: provided always, that all informations for offences against this act shall be laid within one calendar month after the offence committed, and not afterwards.

Mills or factories employing a certain number of persons to be entered in a book kept by the clerk of the peace.

14. And be it further enacted, that every such master or mistress shall, at the Epiphany sessions in every year, make or cause to be made an entry in a book to be kept for that purpose by the clerk of the peace of the county, riding or division in which any mill or factory shall be situate, of every such mill or factory occupied by him or her wherein three or more apprentices, or twenty or more other persons shall be employed; and the said clerk of the peace shall receive for every such entry the sum of two shillings and no more.

Penalties and forfeitures, how to be recovered.

15. And be it further enacted, that all offences for which any penalty is imposed under this act, shall and may be heard before any two or more justices of the peace, acting in or for the place where the offence shall be committed; and all penalties and forfeitures by this act imposed, and all costs and charges attending the conviction of any such offender or offenders, shall and may be levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal of any two or more justices of the peace acting for the county, stewartry, riding, division or place where such offence shall be committed, rendering the overplus (if any) to the party or parties offending; and which warrant such justices are hereby empowered and required to grant, upon conviction of the offender, either by confession, or upon the oath of one or more credible witness or witnesses (which oath such justices are hereby empowered to administer); and in case such distress cannot be found, and such penalties, forfeitures and costs shall not be forthwith paid, it shall and may be lawful for such justices, and they are hereby empowered and required, by warrant under their hands and seals, to commit such offender or offenders to the common gaol or house of correction of the county, stewartry, riding, division or place where the offence shall be committed, for any time not exceeding two calendar months, unless the said penalty, forfeiture and costs shall respectively be sooner paid and satisfied: provided always, that no warrant of distress shall be issued for levying any such penalty, forfeiture or costs, until six days after the offender shall have been convicted, and an order made upon him or her for payment thereof; and no such conviction shall be removable by *certiorari* or bill of advocation into any court whatsoever.

16. And be it further enacted, that every such conviction before such justices may be made in the following form; to wit,

Form of conviction (*y*).

'*County of* } BE it remembered, that on the day
' to wit. } of in the year A. B. was,
'upon the complaint of C. D., convicted before of the jus-
'tices of the peace for the said county of [*or*, for of
'or in the said county of *as the case shall happen to be*], in

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(*y*) See 11 & 12 Vict. c. 43.

'pursuance of an act, passed in the forty-second year of the reign 'of his Majesty King George the Third, for [or, *as the case may be*]. 'Given under our hands and seals, the day and year above 'written.'

Which conviction shall be certified to the next general quarter sessions, there to be filed amongst the records of the county, riding or division.

17. And be it enacted, that this act shall be deemed and taken to be a publick act, and shall be judicially taken notice of as such, by all judges, justices and others, without specially pleading the same. Publick act.

SCHEDULE TO 5 GEO. 4, C. 96.

Form of the Award to be written at the Foot or upon the Back of the Order of the Justices of Peace certifying the Reference.

We, I. K. and L. M. [*name and describe the referees*], the referees appointed to settle the matters in dispute between the parties within named [*or*, I. K., one of the referees so appointed; *or*, L. M., the other referee appointed, having failed to attend; *or*, I, N. O., the justice, *as the case may be*]; do hereby adjudge and determine that [*here set forth the determination; to which the referee or referees or justice, as the case may be, shall subscribe their names*].

Form of Endorsement, extending the Time limited for making the Award.

We, A. B. and C. D., parties to the within reference, do hereby agree to extend the same to the day of inclusive. Witness our hands this day of

Witness A. B.
C. D.

Form of Acknowledgment of Fulfilment of the Award, to be written at the Foot or on the Back thereof.

I, A. B., do hereby acknowledge that the above award hath been fulfilled by C. D., who is hereby discharged of the same. Witness my hand this day of

Witness A. B.

Form of the Oath to be administered by the Arbitrators or Justice to the Parties and Witnesses under this Act.

The evidence that you shall give before us, the arbitrators appointed by A. B. and C. D. [*the parties*] to determine the matters in difference between them under and by virtue of an act passed in the fifth year of the reign of King George the Fourth, intituled, "An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," shall be the truth, the whole truth, and nothing but the truth.

So help you GOD.

Form of Commitment of a Person summoned as a Witness before the Arbitrators.

Whereas proof on oath hath been made before me, one of his Majesty's justices of the peace for the county [*or* riding, stewartry,

division, city, burgh, liberty, town or place] of on this day of that A. B. hath been duly summoned and hath neglected to appear and give evidence before C. D. and E. F., the arbitrators appointed by and between G. H. and I. K. to determine the matters in dispute between them, at in the county [*or* riding, stewartry, division, city, burgh, liberty, town or place] of on the day of under and by virtue of an act made in the fifth year of the reign of his present Majesty, intituled "An Act" [*here set forth the title of this act* (*z*)] and the said A. B. being required by me, the said justice, to give evidence before the said arbitrators, and still refusing so to do, therefore I, the said justice, do hereby, in pursuance of the said act, commit the said A. B. to the [*describing the prison and the house of correction*], there to remain, without bail or mainprize, for his [*or* her] offence aforesaid, until he [*or* she] shall submit himself [*or* herself] to be examined and give his [*or* her] evidence before the said arbitrators touching the matters referred to them as aforesaid, or shall otherwise be discharged by due course of law: And you, the [*constable or other peace officer or officers to whom the warrant is directed*], are hereby authorized and required to take into your custody the body of the said A. B., and him [*or* her] safely to convey to the said prison [*or* house of correction], and him [*or* her] there to deliver to the gaoler [*or* keeper] thereof, who is hereby authorized and required to receive into his custody the body of the said A. B., and him [*or* her] safely to detain and keep pursuant to this commitment. Given under my hand this day of in the year of our Lord .

[This commitment to be directed to the proper peace officer and the gaoler [*or* keeper] of the prison [*or* house of correction].

Form of Warrant of Distress.

To the constable of

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act* (*a*)] is liable to pay to of the sum of and also the sum of and the said having refused or neglected to pay the same for the space of two days and upwards subsequent to the making such award, these are therefore to command you to levy the said sum of by distress and sale of the goods and chattels of the said and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of within days, unless the said sum of for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid: and you are also hereby commanded to certify to me what you shall do by virtue of this my warrant. Given under my hand and seal at the day of

Form of the Constable's Return to the Warrant of Distress.

I constable of do hereby certify to justice of the peace of that I have made diligent search for, but do not know of, nor can find any goods and chattels of by distress and sale whereof I may levy the sum of pursuant to

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(*z*) See last form, *supra*. (*a*) See form, *supra*.

his warrant for that purpose. Dated the day of in the year of our Lord . Given under my hand this day of in the year of our Lord .

Form of Commitment thereupon to the House of Correction.

Here name the county. To the constable of and also to the keeper of the house of correction at .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act* (*b*)] became liable to pay to the sum of and also the sum of for costs, time and expenses, making together the sum of and having refused or neglected to pay the same for the space of two days and upwards subsequent to the making of such award, my warrant was according to the provisions of the said act duly made and issued for the levying the said sum of by distress and sale of the goods and chattels of the said : and whereas it appears by the return of constable of dated the day of that he hath made diligent search for, but doth not know of, nor can find any goods and chattels of the said by distress and sale whereof the said sum of may be levied pursuant to my said warrant: These are therefore to command you the said constable of to apprehend the said and convey him to the said house of correction at aforesaid and deliver him there to the keeper of the said house of correction; and these are also to command you the keeper of the said house of correction to receive him the said into the said house of correction, and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid, shall be sooner satisfied, with all reasonable expenses. Given under my hand and seal at the day of .

Form of Commitment where the Warrant of Distress is withheld.

Here name the county. To the constable of and also to the keeper of the house of correction at .

Whereas of under an award made by on the day of in the year of our Lord pursuant to an act passed in the fifth year of the reign of his present Majesty, intituled "An Act" [*state the title of this act* (*b*),] became liable to pay to the sum of and also the sum of for costs, time and expenses, making together the sum of which he has refused or neglected to pay for the space of two days and upwards subsequent to the making of such award; and whereas it appears to me that the recovery of such sum and warrant of distress, and sale of the goods and chattels of the said will be attended with consequences ruinous or in an especial manner injurious to the defaulter [and his family, *if any*], and I have therefore determined to withhold such warrant, and to commit the said to prison pursuant to the said act: These are therefore to command you the said constable of to apprehend the said and convey him to the said house of correction at aforesaid, and deliver him there to the keeper of the said house of correction; and these are also to command

(*b*) See *supra*.

you the keeper of the said house of correction to receive him the said into the said house of correction, and there keep him without bail or mainprize for the space of months, unless the said sum of so ordered to be paid as aforesaid shall be sooner satisfied with all reasonable expenses. Given under my hand and seal at the day of .

SCHEDULE TO 6 GEO. 4, c. 129.

Form of Conviction and Commitment.

Be it remembered, that on the day of in the year of his Majesty's reign, and in the year of our Lord A. B. is convicted before us [*naming the justices*], two of his Majesty's justices of the peace for the county [*or* riding, division, city, liberty, town or place] of of having [*stating the offence*] contrary to the act made in the sixth year of the reign of King George the Fourth, intituled "An Act to repeal the Laws relating to the Combination of Workmen, and to make other provisions in lieu thereof," and we the said justices do hereby order and adjudge the said A. B. for the said offence to be committed to and confined in the common gaol for the said county [*or* riding, division, city, liberty, town or place] for the space of *or* to be committed to the house of correction at within the said county [*or* riding, division, city, liberty, town or place] there to be kept to hard labour for the space of . Given under our hands the day and year above written.

Form of Commitment of a Person summoned as a Witness.

Whereas C. D. hath been duly summoned to appear and give evidence before us [*naming the justices who issued the summons*] two of his Majesty's justices of the peace for the county [*or* riding, division, city, liberty, town or place] of on this day of at being the time and place appointed for hearing and determining the complaint made by [*the informer or prosecutor*] before us against A. B., of having [*stating the offence as laid in the information*] contrary to the act made in the sixth year of the reign of King George the Fourth, intitutled "An Act" [*here insert the title of this act* (*c*)]: And whereas the said C. D. hath not appeared before us at the time and place aforesaid specified for that purpose or offered any reasonable excuse for his [*or* her] default [*or*, and whereas the said C. D. having appeared before us at the time and place aforesaid specified for that purpose, hath not submitted to be examined as a witness and give his [*or* her] evidence before us touching the matter of the said complaint but hath refused so to do] therefore we the said justices do hereby in pursuance of the said statute commit the said C. D. to the [*describing the prison*] there to remain without bail or mainprize for his [*or* her] contempt aforesaid for three calendar months or until he [*or* she] shall submit himself [*or* herself] to be examined and give his [*or* her] evidence before us touching the matter of the said complaint or shall otherwise be discharged by due course of law: And you the [*constable or other peace officer or officers*

(*c*) See last form.

to whom the warrant is directed] are hereby authorized and required to take into your custody the body of the said C. D. and him [*or* her] safely to convey to the said prison and him [*or* her] there to deliver to the gaoler or keeper thereof, who is hereby authorized and required to receive into his custody the body of the said C. D., and him [*or* her] safely to detain and keep pursuant to this commitment. Given under our hands this day of in the year of our Lord .

[This commitment to be directed to the proper peace officer, and the gaoler or keeper of the prison.]

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1 & 2 WILL. 4, c. 37.

An Act to prohibit the Payment, in certain Trades, of Wages in Goods, or otherwise, than in the current Coin of the Realm.

[15th October, 1831.]

Whereas it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that in all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null and void (*d*).

Contracts for the hiring of artificers must be made in the current coin of the realm;

(*d*) Plaintiff, a framework knitter, worked as a weaver of gloves for defendant in frames provided by defendant at an agreed gross price per dozen pairs. Defendant was a sub-contractor, furnishing the work by agreement to a master manufacturer, who found machinery and materials. Defendant settled with plaintiff weekly for the work done, deducting out of the gross price per dozen certain charges which were according to the known custom of the trade, namely: 1. A frame-rent per week; 2. A payment per week for use of defendant's premises to work in, standing room for the frame, defendant's trouble and loss of time in procuring materials and conveying them to plaintiff, defendant's responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, and delivering them to the master manufacturer; 3. Payment to a boy for winding the yarn, and wear and tear of machinery; 4. A penny per shilling on the net sum earned by plaintiff above fourteen shillings per week as compensation to defendant for a per-centage paid by him to the master manufacturer on the amount of goods manufactured by defendant for him with machinery rented of him by defendant. There was no written contract between plaintiff and defendant: held, that the agreement to pay plaintiff's wages with these deductions was not a contract to pay part of such wages otherwise than in the current coin of the realm, within this

and must not contain any stipulations as to the manner in which the wages shall be expended.

2. And be it further enacted, that if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null and void.

All wages must be paid to the workman in coin.

Payment in goods declared illegal.

3. And be it further enacted, that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void.

Artificers may recover wages, if not paid in the current coin.

4. And be it further enacted, that every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servant's wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm (*e*).

In an action brought for wages no set-off shall be allowed for goods supplied by the employer, or by any shop in which the employer is interested.

5. And be it further enacted, that in any action, suit or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid, against his employer, for the recovery of any sum of money due to any such artificer as the wages of his labour in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction of the plaintiff's demand, by reason or in respect of any goods, wares or merchandize had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares or merchandize sold, delivered or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest (*f*).

No employer shall have any action against his artificer for goods supplied to him on account of wages.

6. And be it further enacted, that no employer of any artificer in any of the trades hereinafter enumerated shall have or be entitled to maintain any suit or action in any court of law or equity against any such artificer, for or in respect of any goods, wares or merchandize sold, delivered or supplied to any such artificer by any such employer, whilst in his employment, as or on account of his wages or reward for his labour, or for or in respect of any goods, wares or merchandize sold, delivered or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.

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section; nor was contract in writing under sect. 23, necessary to legalize such deductions: held also, that there was not in this case any demise of a "tenement" within sect. 23; and *quære*, whether there was a demise of anything at a rent thereon reserved within that section, *Chawner* v. *Cummings*, 8 Q. B. 311; acc. *Archer* v. *James*, 1 Law Times Rep., N. S. 26; *S. C.* 1 Fost. & F.

(*e*) See *Weaver* v. *Floyd*, 21 L. J., Q. B. 151.

(*f*) See *Riley* v. *Warden*, 2 Exc. 59, *post*, p. 423, note (*m*).

7. And be it further enacted, that if any such artificer as aforesaid, or his wife or widow, or if any child of any such artificer, not being of the full age of twenty-one years, shall become chargeable to any parish or place, and if within the space of three calendar months next before the time when any such charge shall be incurred such artificer shall have earned or have become entitled to receive any wages for any labour by him done in any of the said trades, which wages shall not have been paid to such artificer in the current coin of this realm, it shall be lawful for the overseers or overseer of the poor in such parish or place to recover from the employer of such artificer in whose service such labour was done the full amount of wages so unpaid, and to proceed for the recovery thereof by all such ways and means as such artificer himself might have proceeded for that purpose; and the amount of the wages which may be so recovered shall be applied in reimbursing such parish or place all costs and charges incurred in respect of the person or persons to become chargeable, and the surplus shall be applied and paid over to such person or persons.

If the artificer or his wife or children become chargeable to the parish the overseers may recover any wages earned within the three preceding months, and not paid in cash.

8. Provided always, and be it further enacted, that nothing herein contained shall be construed to prevent or to render invalid any contract for the payment, or any actual payment, to any such artificer as aforesaid, of the whole or any part of his wages, either in the notes of the governor and company of the Bank of England, or in the notes of any person or persons carrying on the business of a banker, and duly licensed to issue such notes in pursuance of the laws relating to his Majesty's revenue of stamps, or in drafts or orders for the payment of money to the bearer on demand, drawn upon any person or persons carrying on the business of a banker, being duly licensed as aforesaid, within fifteen miles of the place where such drafts or orders shall be so paid, if such artificer shall be freely consenting to receive such drafts or orders as aforesaid, but all payments so made with such consent as aforesaid, in any such notes, drafts or orders as aforesaid, shall for the purposes of this act be as valid and effectual as if such payments had been made in the current coin of the realm.

Not to invalidate the payment of wages in bank notes, if artificer consents.

9. And be it further enacted, that any employer of any artificer in any of the trades hereinafter enumerated, who shall, by himself or by the agency of any other person or persons, directly or indirectly enter into any contract or make any payment hereby declared illegal, shall for the first offence forfeit a sum not exceeding ten pounds nor less than five pounds, and for the second offence any sum not exceeding twenty pounds nor less than ten pounds, and in case of a third offence any such employer shall be and be deemed guilty of a misdemeanor, and, being thereof convicted, shall be punished by fine only, at the discretion of the court, so that the fines shall not in any case exceed the sum of one hundred pounds (*g*).

Penalties on employers entering into contracts hereby declared illegal.

10. And be it further enacted, that all offences committed against this act, and not hereinbefore declared a misdemeanor, shall be enquired of and determined, and that all fines and penalties for such offences shall be sued for and recovered by any person or persons who shall sue for the same, before any two justices of the peace having jurisdiction within the county, riding, city or place in which

Penalties, how to be recovered.

(*g*) Affidavits in support of a rule for a *certiorari* to remove a conviction under this section, should be intituled "In the Queen's Bench" simply, *Ex parte Wallwork*, 4 D. & L. 403.

the offence shall have been committed (*h*); and that the amount of the fines, penalties and other punishments to be inflicted upon any such offenders shall, within the limits hereinbefore prescribed, be in the discretion of such justices, or, in cases of misdemeanor, of the court before which the offence may be tried; and in case of a second offence against this act, it shall be sufficient evidence of the previous conviction and offence, if a certificate, signed by the clerk of the peace or other officer having the custody of the record of such previous conviction shall be produced before the said justices enquiring of such second offence, in which certificate shall be stated in a compendious form the general nature of the offence for which such previous conviction was had, and the date of such previous conviction; and so in like manner, upon the trial of any indictment or information for any such misdemeanor as aforesaid, it shall be sufficient evidence of such second conviction for a like offence if a certificate thereof, signed by the clerk of the peace or other officer having the custody of the record of such second conviction, in such form as aforesaid, be produced to the court and jury: provided always, that no person shall be punished as for a second offence under this act unless ten days at the least shall have intervened between the conviction of such person for the first and the conviction by (*i*) such person of the second offence, but each separate offence committed by any such person before the expiration of the said term of ten days shall be punishable by a separate penalty, as though the same were a first offence; and that no person shall be punished as for a third offence under this act, unless ten days at the least shall have intervened between the conviction of such person for the second and the conviction by (*i*) such person of the third offence; but each separate offence committed by any such person before the expiration of the said term of ten days shall be punishable by a separate penalty, as though the same were a second offence; and that the fourth or any subsequent offence which may be committed by any such person against this act shall be enquired of, tried and punished in the manner hereinbefore provided in respect of any third offence; and that if the person or persons preferring any such information shall not be able or shall not see fit to produce evidence of any such previous conviction or convictions as aforesaid, any such offender as aforesaid shall be punished for each separate offence by him committed against the provisions of this act by an equal number of distinct and separate penalties, as though each of such offences were a first or a second offence, as the case may be; and that no person shall be proceeded against or punished as for a second or as for a third offence at the distance of more than two years from the commission of the next preceding offence.

Second offence.

Proviso.

Justices may compel the attendance of witnesses.

11. And be it further enacted, that it shall be lawful for any one justice of the peace, in all cases where any information or complaint shall be made as aforesaid, and he is hereby authorized and required, at the request in writing of any of the parties to the said complaint, and on the oath of the informer or complainant, or of the person informed or complained against, that he believes that the attendance of any person or persons as a witness or witnesses will be material to the hearing of such information, to issue his summons to any such

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(*h*) The offence is complete where the note is given, although the goods are delivered out of the jurisdiction of the convicting justices, *Ashersmith* v. *Drury*, 28 L. J., M. C. 5; *S. C.* 32 Law Times Rep. 103.

(*i*) *Sic.*

person or persons, witness or witnesses, to appear and give evidence on oath before himself and such other justice or justices as shall hear and determine such information or complaint, the time and place of hearing and determining the same being specified in the said summons; and if any person or persons so summoned shall not appear before the said last mentioned justices at the time or place so specified in the said summons, and shall not offer any reasonable excuse for the default, to the satisfaction of the said last mentioned justices, or appearing according to the directions of the said summons shall not submit to be examined as a witness or witnesses, then and in every such case it shall be lawful for such last mentioned justices, and they are hereby authorized (proof on oath, in the case of any person not appearing according to such summons, having been first made before such last mentioned justices of the due service of such summons on every such person, by delivering the same to him or to her, or by leaving the same at the usual place of abode of such person, twenty-four hours at the least before the time appointed for such person to appear before such last mentioned justices), by warrant under the hands and seals of such last mentioned justices to commit such person or persons so making default in appearing, or appearing and refusing to give evidence, to some prison within the jurisdiction of the said justices, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person or persons shall submit to be examined and give evidence.

Power to levy penalties by distress.

12. And be it further enacted, that all justices of the peace shall and are hereby empowered, on the conviction of any person or persons for any offence against this act, in default of payment of any penalty or forfeiture, together with the reasonable costs and charges attending such conviction, to cause the same to be levied by distress and sale of the goods and chattels of the offender or offenders, by warrant or warrants under the hands and seals of such justices, together with the reasonable costs of such distress and sale, and in case it shall appear to the satisfaction of such justices, either by the confession of the offender or offenders or by the oath of one or more credible witness or witnesses, that he, she or they hath not or have not goods and chattels within the jurisdiction of such justices sufficient whereon to levy all such penalties and forfeitures, costs and charges, such justices may, without issuing any warrant of distress, commit the offender or offenders to the common gaol for three calendar months (unless the same be sooner paid) in such manner as if a warrant of distress had been issued, and a return of *nulla bona* made thereon.

A partner not to be liable in person for the offence of his co-partner, but the partnership property to be so liable.

13. And be it further enacted, that no person shall be liable to be convicted of any offence against this act committed by his or her copartner in trade, and without his or her knowledge, privity or consent; but it shall be lawful, when any penalty or any sum for wages, or any other sum, is ordered to be paid, under the authority of this act, and the person or persons ordered to pay the same shall neglect or refuse to do so, to levy the same by distress and sale of any goods belonging to any copartnership concern or business in the carrying on of which such charges may have become due or such offence may have been committed: and in all proceedings under this act to recover any sum due for wages it shall be lawful in all cases of copartnership for the justices, at the hearing of any complaint for the nonpayment thereof, to make an order upon any one or more copartners for the payment of the sum appearing to be due; and in such case the service of a copy of any summons or other process, or of any order, upon one or more of such copartners, shall be deemed to be a sufficient service upon all.

How summonses are to be served.

14. And it is declared and enacted, that in all cases it shall be deemed and taken to be sufficient service of any summons to be issued against any offender or offenders by any justice or justices of the peace, under the authority of this act, if a duplicate or true copy of the same be left at or upon the place used or occupied by such offender or offenders for carrying on his, her or their trade or business, or at the place of residence of any such offender or offenders, being at or upon any such place as aforesaid, the same being directed to such offender or offenders by his, her or their right or assumed name or names.

Form of conviction, &c.

15. And be it further enacted, that the justices before whom any person shall be convicted of any offence against this act, or by whom any person shall be committed to the common gaol, in default of a sufficient distress, or for not appearing as a witness, or not submitting to be examined, shall cause all such convictions, and the summonses for the attendance of witnesses, and the warrants or orders for such commitments, and the warrant or order for any such distress, to be drawn up in the form or to the effect set forth in the schedule to this act annexed, with such additions or variations as may be necessary for adapting the same to the particular circumstances of the case.

Justices to return convictions to the clerk of the peace, who is to deliver copies to persons applying.

16. And be it further enacted, that the justices before whom any conviction shall be had under this act shall cause the same to be returned to the next general or quarter sessions of the peace holden for the county or place wherein the offence shall have been committed, and the same shall then and there be delivered to the clerk of the peace, or other person acting as such, to be by him filed among the records of the said court; and such clerk of the peace, or other person acting as such, is hereby required, on the tender and payment to him of the sum of one shilling, to grant to any person or persons, on demand, a copy of any such conviction, with a certificate thereupon indorsed or thereunto annexed, that the same is a true and accurate copy of the original conviction returned to such general or quarter sessions as aforesaid.

Convictions not to be quashed for want of form.

17. And be it further enacted, that no conviction, order or adjudication made by any justices of the peace under the provisions of this act shall be quashed for want of form, nor be removed by *certiorari* or otherwise into any of his Majesty's superior courts of record; and no warrant of distress, or of commitments in default of sufficient distress, shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Application of penalties.

18. And be it further enacted, that out of any penalty or forfeiture incurred by any offence committed against this act, it shall be lawful for the court or justices imposing the same to award any sum to the informer, not exceeding in any case the sum of twenty pounds; and the rest of any such pecuniary penalty or forfeiture shall go to the treasurer of the county in which the offence shall be committed, in aid of the rates of such county: provided always, that every proceeding whatsoever for any offence against this act shall be commenced within three calendar months after such offence shall have been committed.

Specification of the trades to which the act is to apply.

19. And be it further enacted, that nothing herein contained shall extend to any artificer, workman or labourer, or other person engaged or employed in any manufacture, trade or occupation, excepting only artificers, workmen, labourers and other persons employed in the several manufactures, trades and occupations following; (that is to say), in or about the making, casting, converting or

manufacturing of iron or steel, or any parts, branches or processes thereof (*k*); or in or about the working or getting of any mines of coal (*l*), ironstone, limestone, salt rock; or in or about the working or getting of stone, slate, or clay (*m*); or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or manufacturing of any kinds of nails, chains, rivets, anvils, vices, spades, shovels, screws, keys, locks, bolts, hinges or any other articles or hardwares made of iron or steel, or of iron and steel combined, or of any plated articles of cutlery, or of any goods or wares made of brass, tin, lead, pewter or other metal, or of any japanned goods or wares whatsoever; or in or about the making, spinning, throwing, twisting, doubling, winding, weaving, combing, knitting, bleaching, dyeing, printing, or otherwise preparing of any kinds of woollen, worsted. yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hemp, flax, mohair or silk manufactures whatsoever, or in or about any manufactures whatsoever made of the said last mentioned materials, whether the same be or be not mixed one with another; or in or about the making or otherwise preparing, ornamenting or finishing of any glass, porcelain, china or earthenware whatsoever, or any parts, branches or processes thereof, or any materials used in any of such last mentioned trades or employments; or in or about the making or preparing of bone, thread, silk, or cotton lace, or of lace made of any mixed materials.

Domestics.

20. And be it further enacted, that nothing herein contained shall extend to any domestic servant or servant in husbandry.

Certain persons not to act as justices.

21. And be it further enacted, that no justice of the peace, being a person also engaged in any of the trades or occupations enumerated in this act, or the father, son or brother of any such person, shall act as a justice of the peace under this act.

County magistrates to act in cases where those of towns, &c., are disqualified as above.

22. And be it further enacted, that in all cities, boroughs or corporate towns, where the magistrates for the time being are disqualified by the foregoing clause from administering this act, then and in every such case, and so often as the same shall happen, it shall be lawful for the magistrates of the county in which the offence may be committed (and not disqualified as aforesaid) to administer, and they are hereby authorized and empowered to hear, examine and determine any offences committed against this act in any such cities, boroughs or corporate towns; and it shall be lawful for the complainant to remove the cases of information or complaint from the said cities, boroughs or corporate towns to any other court of session

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(*k*) In *Millard* v. *Kelly*, 32 Law Times, 123, a labourer employed in loading boats with iron, was held within the act.

(*l*) In *Bowers* v. *Lovekin*, 25 L. J., Q. B. 371; *S. C.* 6 E. & B. 584, butty colliers, who engaged to get coal at so much per yard, and were bound to work personally, and who did so work, were held within the act, although they employed other workmen under them.

(*m*) A contractor, to execute a railway cutting at so much per cubic yard, who employs men under him to assist, is not a *workman* or *labourer* within the true meaning of this act, although he does a portion of the work himself. Where the earth removed is *clay*, which is used for making bricks; *quære*, whether a labourer engaged in the removal of such earth is a person "employed in or about the working or getting of clay," within sect. 19, *Riley* v. *Warden*, 2 Exc. 59; *Sharman* v. *Saunders*, 13 C. B. 166; *Ingram* v. *Barnes*, 26 L. J., Q. B. 82, 319; *S. C.* 7 E. & B. 115; see also *ante*, p. 326, note (*f*); and *Weaver* v. *Floyd*, 21 L. J., Q. B. 151.

or petty session not exceeding twelve miles from the place where the offence shall have been committed, any law, charter, usage or custom to the contrary notwithstanding.

Particular exceptions to the generality of the law.

23. And be it further enacted and declared, that nothing herein contained shall extend or be construed to extend to prevent any employer or any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman or labourer employed in any of the trades or occupations enumerated in this act the whole or any part of any tenement at any rent (*n*) to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer, for or in respect of any such rent; or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid; provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

Employers may advance money to artificers for certain purposes.

24. And be it further enacted and declared, that nothing herein contained shall extend or be construed to extend to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law, nor from advancing to any such artificer any money for his relief in sickness, or for the education of any child or children of such artificer, nor from deducting or contracting to deduct any sum or sums of money from the wages of such artificers for the education of any such child or children of such artificer, and unless the agreement or contract for such deduction shall be in writing, and signed by such artificer.

Definition of terms,

25. And be it further enacted and declared, that in the meaning and for the purposes of this act all workmen, labourers (*o*) and other persons in any manner engaged in the performance of any work, employment or operation of what nature soever, in or about the several

"artificers," trades and occupations aforesaid, shall be and be deemed "artificers;" and that within the meaning and for the purposes aforesaid all masters, bailiffs, foremen, managers, clerks and other persons engaged in the hiring, employment or superintendence of the labour

"employers," of any such artificers, shall be and be deemed to be "employers;" and that within the meaning and for the purposes of this act any money or other thing had or contracted to be paid, delivered or given as a recompence, reward or remuneration for any labour done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and

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(*n*) See *Chawner* v. *Cummings*, *ante*, p. 417, note (*d*).

(*o*) See *Riley* v. *Warden*, *ante*, p. 423, note (*m*).

taken to be the "wages" of such labour; and that within the meaning and for the purposes aforesaid any agreement, understanding, device, contrivance, collusion or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a "contract." "wages," "contract."

26. And be it further enacted, that this act shall not commence or take effect till the expiration of three calendar months next after the day of passing the same. Commencement of act.

27. And be it further enacted, that the provisions of this act shall extend over the whole of that part of the United Kingdom of Great Britain and Ireland called Great Britain. To extend over Great Britain.

SCHEDULE referred to in the foregoing Act.

Form of Conviction.

} BE it remembered, that on this day of
to wit. } in the year of our Lord at in the county
of A. B. is duly convicted before us, C. D. and J. G., two of his Majesty's justices of the peace for the of for that the said A. B. [*specify the offence, and the time and place when and where committed*], whereby the said A. B. has forfeited the sum of this being adjudged to be the first [*or* second] offence [*as the case may be*] against the provisions of an act to prohibit the payment of wages in goods, besides the costs of this conviction, which we assess at the sum of [*here state to whom and in what proportions the penalty and costs are to be paid*], pursuant to the statute in that case provided.

Given under our hands and seals,

Summons to Witness.

} WHEREAS information upon oath hath been made
to wit. } before me, A. B. Esquire, one of his Majesty's justices of the peace for the county aforesaid, that C. D. of has been guilty of an offence against the laws prohibiting the payment of wages in goods, and that you are a material witness to be examined on the hearing and determination of such information: These are therefore to require you to appear personally before me and such other justice or justices as shall hear and determine such information, at in the county aforesaid, on the day of at the hour of of the same day, there to be examined touching the matters alleged in such information. As witness my hand,

Warrant of Commitment of a Witness.

} To the constable or other proper officer and to the keeper
to wit. } or gaoler of .

Whereas C. D. hath been duly summoned to appear and give evidence before us, A. O. and G. F., two of his Majesty's justices of the peace for the county [*or* riding, city, division *or* place], of on this day of being the time and place appointed

for hearing and determining the complaint made on the oath of before us, against A. B., of having [*stating the offence as laid in the information*] contrary to the laws now in force for prohibiting the payment of wages in goods; And whereas the said C. D. hath not appeared before us at the time and place aforesaid specified for that purpose, or offered any reasonable excuse for his default [*or*]: and whereas the said C. D. having appeared before us at the time and place aforesaid specified for that purpose, hath not submitted to be examined as a witness and give his evidence before us touching the matter of the said complaint, but hath refused so to do [*or*]; Therefore we the said justices do hereby, in pursuance of the statute made, *&c.* [*setting forth the title of this act*] commit the said C. D. to the [*describing the prison*] there to remain without bail or mainprize, for his contempt aforesaid, for the space of three calendar months, or until he shall submit himself to be examined and give his evidence touching the matter of the said complaint, or shall otherwise be discharged by due course of law. And you [*the constable or peace officer to whom the warrant is directed*] are hereby authorized and required to take into your custody the body of the said C. D., and him safely to convey to the said prison, and him there to deliver to the gaoler or keeper thereof, who is hereby authorized and required to receive into his custody the body of the said C. D., and him safely to retain and keep, pursuant to this commitment. Given under our hands and seals this day of in the year of our Lord .

Warrant to distrain for Forfeiture.

} To the constable [headborough] *or* [tithingman] of .
to wit. }

Whereas A. B. of is this day convicted before us, C. D. and J. G., two of his Majesty's justices of the peace in and for the said county, upon oath of H. K., a credible witness, for that the said A. B. did [*here set forth the offence*], contrary to the statute in that case made and provided, by reason whereof the said A. B. hath forfeited the sum of to be distributed as herein is mentioned, besides the sum of for costs, both of which he hath refused to pay; These are therefore, in his Majesty's name, to command you to levy the said sum of and also the sum of for costs, by distress of the goods and chattels of him the said A. B.; and if within the space of days next after such distress by you taken, the said sums, together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale that you do retain the said costs, and also the said forfeiture or sum of and thereout pay to L. M., who hath informed and prosecuted in this case, the sum of being his adjudged portion of such forfeiture, the residue whereof is to go to the treasurer of the said county of in aid of the rates thereof; and that you do return the overplus, on demand, to him the said A. B. (the reasonable charges of taking, keeping and selling the said distress being first deducted); and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of that then you certify the same to us, together with this warrant.

Given under our hands and seals,

Commitment for Want of Distress.

To wit. } To the [constable] of in the said county, and to the keeper of the common gaol [*or* the house of correction] at in the said county.

Whereas A. B., of in the said county was on the day of convicted before us, C. D. and J. G., two of his Majesty's justices of the peace in and for the said county, upon the oath of H. K., a credible witness, for that he the said A. B. [*here set forth the offence*], contrary to the statute made in the year of the reign of his Majesty King William the Fourth, by reason whereof the said A. B. hath forfeited the sum of besides the sum of for costs: and whereas on the day of in the year aforesaid we did issue our warrant to the [constable] of to levy the said sum of and costs, by distress and sale of the goods and chattels of him the said A. B., and to distribute the same according to the directions of the said statute: And whereas it duly appears to us, upon the oath of the said [constable], that the said [constable] hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B. as aforesaid, but that no sufficient distress can be had whereon to levy the same [*or* by confession of the said A. B., *or* by the oath of a credible witness, that the said A. B. hath not goods and chattels within our jurisdiction whereon to levy the said forfeiture and costs]; These are therefore to command you the said [constable] of aforesaid to apprehend the said A. B., and him safely to convey to the common gaol [*or* house of correction] at in the said county, and there to deliver him to the keeper thereof, together with this precept. And we do also command you the said keeper to receive and keep in your custody the said A. B. for the space of three months, unless the said sum and costs shall be sooner paid; and for so doing this shall be your sufficient warrant. Given under our hands and seals,

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3 & 4 WILL. 4, c. 103.

An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom (*p*).

[29th August, 1833.]

Whereas it is necessary that the hours of labour of children and young persons employed in mills and factories should be regulated, inasmuch as there are great numbers of children and young persons now employed in mills and factories, and their hours of labour are longer than is desirable, due regard being had to their health and means of education: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of January, one thousand eight hundred and thirty-four no person under eighteen years of age shall be allowed to work in the night (that is to say), Persons under eighteen years of age not allowed

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(*p*) See also 7 & 8 Vict. c. 15; 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, *post*; 16 & 17 Vict. c. 104, *post*; 19 & 20 Vict. c. 38, *post*; and as to ropeworks, &c., see 9 & 10 Vict. c. 40, *post*, p. 458, note.

to work at night in the mills or factories herein described.

between the hours of half-past eight o'clock in the evening and half-past five o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen or silk mill or factory, wherein steam or water or any other mechanical power is or shall be used to propel or work the machinery in such mill or factory, either in scutching, carding, roving, spinning, piecing, twisting, winding, throwing, doubling, netting, making thread, dressing or weaving of cotton, wool, worsted, hemp, flax, tow or silk, either separately or mixed, in any such mill or factory situate in any part of the United Kingdom of Great Britain and Ireland: provided always, that nothing in this act shall apply or extend to the working of any steam or other engine, water-wheel, or other power in or belonging to any mill or building or machinery when used in that part of the process or work commonly called fulling, roughing or boiling of woollens, nor to any apprentices or other persons employed therein, nor to the labour of young persons above the age of thirteen years when employed in packing goods in any warehouse or place attached to any mill, and not used for any manufacturing process: provided also, that nothing in this act shall apply or extend to any mill or factory used solely for the manufacture of lace.

Persons under eighteen not to work more than twelve hours a day.

2. And be it further enacted, that no person under the age of eighteen years shall be employed in any such mill or factory in such description of work as aforesaid more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as hereinafter provided (*q*).

Extension of hours of working in certain cases.

3. Provided always, and be it further enacted, that if at any time in any such mill, manufactory or buildings situated upon any stream of water, time shall be lost in consequence of the want of a due supply or of an excess of water, or by reason of its being impounded in higher reservoirs, then and in every such case and so often as the same shall happen it shall be lawful for the occupier of any such mill, manufactory or building to extend the time of labour in this act prescribed at the rate of three hours per week until such lost time shall have been made good, but no longer, such time to be worked between the hours of five of the clock in the morning and nine of the clock in the evening; provided also that no time shall be recoverable after it has been lost six calendar months (*r*).

Providing for unavoidable time lost in cases of accident.

4. And be it further enacted, that when any extraordinary accident shall happen to the steam-engine, water-wheel, weirs or watercourses, main shafting, main gearing, or gas apparatus of any such mill, manufactory or buildings, by which not less than three hours' labour at any one time shall be lost, then and in every such case such time may be worked up at the rate of one hour a day, in addition to the aforesaid and hereinafter restricted hours of labour, for the twelve following working days, but not after (*r*).

Loss of time from the want or excess of water in the daytime provided for.

5. And whereas during periods of drought and of floods the power of water-wheels on some streams is wholly interrupted, or so far diminished that the machinery or part or parts of the machinery dependent upon such power cannot be regularly worked at one and the same time, and in consequence thereof a certain portion of the time of such persons as are employed in the working of such machinery may be lost in each day during such period of drought or floods; be it therefore enacted, that it shall be lawful for the occu-

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(*q*) See note (*p*), p. 427.

(*r*) As to recovering lost time, see also 7 & 8 Vict. c. 15, ss. 33, 34; 13 & 14 Vict. c. 54, s. 4, *post*; 16 & 17 Vict. c. 104, *post*.

pier of any mill, manufactory, or building, when time is so lost, then and in every such case and so often as the same shall happen, to extend the hours between which persons under eighteen years of age are hereinbefore allowed to work (*videlicet*, from five of the clock in the morning till nine in the evening), as hereinbefore limited, to such period as may in such case be necessary to prevent the loss of time, and no longer: provided always, that no child or young person within the respective ages prescribed by this act shall be actually employed a greater number of hours within the twenty-four hours of any one day than this act declares to be lawful; and provided also, that no child under thirteen years of age shall be employed after the hour of nine of the clock in the evening nor before the hour of five in the morning (*s*).

Time for meals.

6. And be it further enacted, that there shall be allowed in the course of every day not less than one and a half hours for meals to every such person restricted as hereinbefore provided to the performance of twelve hours' work daily (*t*).

Employment of children under nine years prohibited.

7. And be it enacted, that from and after the first day of January one thousand eight hundred and thirty-four it shall not be lawful for any person whatsoever to employ in any factory or mill as aforesaid, except in mills for the manufacture of silk, any child who shall not have completed his or her ninth year of age (*u*).

The employment of children under eleven, twelve, and thirteen years of age for more than eight hours a day prohibited.

8. And be it further enacted, that from and after the expiration of six months after the passing of this act it shall not be lawful for any person whatsoever to employ, keep or allow to remain in any factory or mill as aforesaid for a longer time than forty-eight hours in any one week, nor for a longer time than nine hours in any one day, except as herein provided, any child who shall not have completed his or her eleventh year of age, or after the expiration of eighteen months (*x*) from the passing of this act any child who shall not have completed his or her twelfth year of age or after the expiration of thirty months (*x*), from the passing of this act any child who shall not have completed his or her thirteenth year of age: provided nevertheless, that in mills for the manufacture of silk, children under the age of thirteen years shall be allowed to work ten hours in any one day (*y*).

Holidays to be allowed.

9. And be it further enacted, that all children and young persons whose hours of work are regulated and limited by this act shall be entitled to the following holydays; *videlicet*, on Christmas Day and Good Friday the entire day, and not fewer than eight half days besides in every year, such half days to be at such period or periods, together or separately, as may be most desirable and convenient, and as shall be determined on by the master of such children and young persons: provided nevertheless, that in Scotland any other days may be substituted for Christmas Day and for Good Friday, both or either, as such master may determine (*z*).

(*s*) See note (*r*), p. 428.

(*t*) See 7 & 8 Vict. c. 15, s. 36; 13 & 14 Vict. c. 54, s. 3, *post*; 16 & 17 Vict. c. 104, *post*.

(*u*) See 7 & 8 Vict. c. 15, s. 29, *post*.

(*x*) "Calendar" months, 4 & 5 Will. 4, c. 1.

(*y*) By 4 & 5 Will. 4, c. 1, it is enacted, that in mills for the manufacture of silk, children under the age of thirteen years shall be allowed to work ten hours *every working day* in the week. See also 7 & 8 Vict. c. 15, s. 30, *post*; 16 & 17 Vict. c. 104, *post*.

(*z*) See further 7 & 8 Vict. c. 15, s. 37, *post*; 16 & 17 Vict. c. 104, *post*.

Children employed in any one mill less than nine hours not to be employed in any other mill more than the residue of nine hours.

10. And be it further enacted, that if any child within the age hereinbefore restricted to nine hours a day labour shall have been employed in any one day for less than nine hours in one factory or mill, it shall be lawful for any person to employ such child in any other factory or mill on the same day for the residue of such nine hours; provided that such employment in such other mill or factory shall not increase the labour of such child to more than nine hours in any one day, or to more than forty-eight hours in any one week.

Children not to be employed without a certificate from a surgeon as to strength and appearance.

11. And be it further enacted, that from and after the expiration of six months after the passing of this act it shall not be lawful for any person to employ, keep or allow to remain in any factory or mill any child who shall not have completed his or her eleventh year of age without such certificate as is hereinafter mentioned, certifying such child to be of the ordinary strength and appearance of a child of the age of nine years, nor from and after the expiration of eighteen months after the passing of this act any child who shall not have completed his or her twelfth year of age, without a certificate of the same form, nor from and after the expiration of thirty months after the passing of this act any child who shall not have completed his or her thirteenth year of age, without a certificate of the same form, which certificate shall be taken to be sufficient evidence of the ages respectively certified therein (*a*).

Certificates to be made by a surgeon or physician.

12. And be it further enacted, that for the purpose of obtaining the certificate hereinbefore required in the case of children under the age of eleven, twelve or thirteen years respectively, the child shall personally appear before some surgeon or physician of the place or neighbourhood of its residence, and shall submit itself to his examination; and unless the surgeon or physician before whom the child has so appeared shall certify his having had a personal examination or inspection of such child, and also that such child is of the ordinary strength and appearance of children of or exceeding the age of nine years, and unless also such certificate shall within three months of its date be countersigned by some inspector or justice, or in that part of the United Kingdom called Scotland by some inspector or justice or burgh magistrate, such child shall not be employed in any factory or mill (*a*).

Form of certificate of surgeon or physician.

13. And be it further enacted, that the certificates hereinbefore required in the case of children under the age of eleven, twelve or thirteen years respectively shall be in the form following (*b*):—

I [*name and place of residence*], surgeon [*or* physician], do hereby certify, that A. B. the son [*or* daughter] of [*name and residence of parents, or if no parents, then the residence of the child*] has appeared before me, and submitted to my examination; and that the said [*name*] is of the ordinary strength and appearance [*according to the fact*] of a child of at least nine years of age [*or if apparently above nine, say* exceeding].

Children between eleven and eighteen not to be employed in factories more than nine hours a day, or at night, without a certificate of age.

14. And be it further enacted, that from and after the commencement of the several periods hereinbefore appointed for restricting the employment of children under the ages of eleven, twelve and thirteen years respectively, it shall not be lawful to employ, keep or allow to remain in any factory or mill any person between the said ages respectively and the age of eighteen for more than nine hours in any day, nor between the hours of nine o'clock in the evening and five o'clock in the morning, without first requiring and receiving from such person a certificate in proof that such person is above the

(*a*) See further as to these certificates, 7 & 8 Vict. c. 15, ss. 8 to 17, inclusive, *post.*

(*b*) See last note.

age of eleven, twelve and thirteen respectively, which certificate, if a new certificate shall be required, shall be in such form as may be ordered by an inspector.

Penalties against persons not having certificates not to be levied if it shall appear that the person employed was above the age required.

15. Provided nevertheless, and be it enacted, that the penalties and punishments hereinafter provided against any person not requiring or not receiving such certificate shall not be levied, if upon the complaint or proceeding for the enforcement of such penalties it shall appear to the satisfaction of the inspector or justice, or in that part of the United Kingdom called Scotland to the satisfaction of the inspector or justice or burgh magistrate, by or before whom such proceeding shall be had, that the person so employed more than nine hours in the day, or between the hours of nine o'clock in the evening and half-past five o'clock in the morning, without such certificate, was at the time of the alleged offence above the age of eleven, twelve or thirteen respectively.

Provision in case magistrates refuse to countersign certificate.

16. And be it further enacted, that in case any inspector or justice or burgh magistrate shall refuse to countersign any such certificate, he shall state in writing his reasons for such refusal, and the parents of such child may thereupon take the certificate to the justices of the peace at petty sessions for the place or district of the child's residence, who are hereby empowered and required to decide upon the validity of such refusal; and every such act of any such petty sessions shall be free of all charge, cost or expence whatsoever.

42 Geo. 3, c. 73.

17. And whereas by an act, intituled "An Act for the Preservation of the Health and Morals of Apprentices and others employed in Cotton and other Mills and Cotton and other Factories," passed in the forty-second year of the reign of his late Majesty George the Third (*c*), it was amongst other things provided, that the justices of the peace for every county or place in which such mill was situated should appoint yearly two persons not interested in or in any way connected with such mills or factories in such county to be visitors of such mills or factories, which visitors so appointed were empowered and required by the aforesaid act to enter such factories at any time they might think fit, and examine and report in writing whether the same were conducted according to the laws of the realm, and also to direct the adoption of such sanitary regulations as they might, on advice, think proper: And whereas it appears that the provisions of the said act with relation to the appointment of inspectors were not duly carried into execution, and that the laws for the regulation of the labour of children in factories have been evaded, partly in consequence of the want of the appointment of proper visitors or officers whose special duty it was to enforce their execution; be it therefore enacted, that upon the passing of this act it shall be lawful for his Majesty by warrant under his sign manual to appoint during his Majesty's pleasure four persons to be inspectors of factories and places where the labour of children and young persons under eighteen years of age is employed, and in the case of the death or dismissal of any of them to appoint another in the place of such deceased inspector, which said several inspectors shall carry into effect the powers, authorities, and provisions of the present act; and such inspectors or any of them are hereby empowered to enter any factory or mill, and any school attached or belonging thereto, at all times and seasons, by day or by night, when such mills or factories are at work, and having so entered to examine therein the children and any other person or persons employed therein, and to make in-

Inspectors to be appointed.

(*c*) *Ante*, p. 408, and see further as to inspectors and their duties, &c., 7 & 8 Vict. c. 15, ss. 2 to 8 inclusive, *post*.

quiry respecting their condition, employment and education; and such inspectors or any of them are hereby empowered to take or call to their aid in such examination and inquiry such persons as they may choose, and to summon and require any person upon the spot or elsewhere to give evidence upon such examinations and inquiry, and to administer to such person an oath.

Powers and duties of inspectors for the enforcement of this act.

18. And be it further enacted, that the said inspectors or any of them shall have power and are hereby required to make all such rules, regulations and orders as may be necessary for the due execution of this act, which rules, regulations and orders shall be binding on all persons subject to the provisions of this act: and such inspectors are also hereby authorized and required to enforce the attendance at school of children employed in factories according to the provisions of this act, and to order tickets or such other means as they may think fit for vouchers of attendance at such schools; and such inspectors are also hereby required to regulate the custody of such tickets or vouchers, and such inspectors may require a register of them to be kept in every school and factory; and such inspectors are also hereby authorized and required to order a register of the children employed in any factory, and of their sex and hours of attendance, and of their absence on account of sickness, to be kept in such factory; and all registers, books, entries, accounts and papers kept in pursuance of this act shall at all times be open to such inspectors, and such inspectors may take or cause to be taken for their own use such copy as they may think proper; and such inspectors shall also make such regulations as may be proper to continue in force any certificates, tickets or vouchers required by this act, and such certificates, tickets or vouchers so continued in force shall have the same operation and effect as new certificates, tickets or vouchers; and such inspector shall order and is hereby authorized to order the occupier of any factory or mill to register or cause to be registered any information with relation to the performance of any labour in such mill or factory, if such inspector deem such information necessary to facilitate the due enforcement of any of the provisions of this act or of any of the regulations which he may make under the authority of this act; and such inspector is hereby authorized to order such occupier of any mill or factory to transmit, in such manner as may be directed in such order, any information with relation to the persons employed or the labour performed in such mill or factory that such inspector may deem requisite to facilitate the performance of his duties, or any inquiry made under the authority of this act.

One of the Secretaries of State may appoint persons to superintend under the inspector the execution of this act.

19. And be it further enacted, that it shall be lawful for one of his Majesty's principal Secretaries of State, if he shall see fit, upon the application of any inspector, to appoint any one or more persons to superintend, under the direction of any inspector, the execution of the provisions of this act, and of all rules, regulations and orders made under the authority thereof; and such person shall be paid by such salary as may be determined by one of his Majesty's principal Secretaries of State; and such person so appointed shall have authority to enter any school-room, counting-house, or any part of any factory or mill, excepting such part or parts as may be used for manufacturing processes; and if any constable or peace officer shall be required by any inspector to perform any continuous service, it shall be lawful for such inspector to allow a special recompence to such constable or peace officer for such service: provided, nevertheless, that any such orders may be altered or disallowed by one of his Majesty's principal Secretaries of State, on complaint made to him by memorial from any party interested.

Children in factories to attend a school.

20. And be it further enacted, that from and after the expiration of six months from the passing of this act every child hereinbefore restricted to the performance of forty-eight hours of labour in any one week shall, so long as such child shall be within the said restricted age, attend some school to be chosen by the parents or guardians of such child, or such school as may be appointed by any inspector in case the parents or guardians of such child shall omit to appoint any school, or in case such child shall be without parents or guardians; and it shall and may be lawful, in such last-mentioned case, for any inspector to order the employer of any such child to make a deduction from the weekly wages of such child as the same shall become due, not exceeding the rate of one penny in every shilling, to pay for the schooling of such child; and such employer is hereby required to pay the sum so deducted according to the order and direction of such inspector (*d*).

Schoolmaster's voucher required.

21. And be it further enacted, that after the expiration of six months from the passing of this act it shall not be lawful to employ or continue to employ in any factory or mill any child restricted by this act to the performance of forty-eight hours of labour in any one week, unless such child shall, on Monday in every week next after the commencement of such employment, and during every succeeding Monday or other day appointed for that purpose by an inspector give to the factory master or proprietor, or to his agent, a schoolmaster's ticket or voucher, certifying that such child has for two hours at least for six out of seven days of the week next preceding attended his school, excepting in cases of sickness, to be certified in such manner as such inspector may appoint, and in case of any holiday, and in case of absence from any other cause allowed by such inspector, or by any justice of the peace in the absence of the inspector; and the said last-mentioned ticket shall be in such form as may be settled by any inspector (*e*).

Means of providing additional schools.

22. And be it further enacted, that wherever it shall appear to any inspector that a new or additional school is necessary or desirable to enable the children employed in any factory to obtain the education required by this act, such inspector is hereby authorized to establish or procure the establishment of such school.

Inspector may disallow order for salary, if schoolmaster or schoolmistress incompetent.

23. And be it further enacted, that if upon any examination or inquiry any inspector shall be of opinion that any schoolmaster or schoolmistress is incompetent or in any way unfit for the performance of the duties of that office, it shall and may be lawful for such inspector to disallow and withhold the order for any payment or any salary to such schoolmaster or schoolmistress as hereinbefore provided.

Mill-owner liable to penalty for child remaining on the premises more than nine hours.

24. And be it further enacted, that if any child within the several ages hereinbefore restricted to the performance of nine hours of day labour shall be kept or allowed to remain in any room or place whatsoever where any machinery is used, or shall be kept or allowed to remain on any premises within the outer walls of any factory or mill, for any longer time than nine hours during any one day, or for any longer time than the residue of such nine hours in the case of any child which has been previously employed for any shorter time during the same day in any other factory or mill, the occupier of such factory or mill shall, without any evidence of the employment of such child, be liable to the same penalty and punishment as for employing

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(*d*) See further, 7 & 8 Vict. c. 15, ss. 38, 57, *post*.

(*e*) See further, 7 & 8 Vict. c. 15, s. 39.

Proviso as to play-grounds and schools.

such child for such longer period: provided nevertheless, that no place, yard or play-ground open to the public view shall be considered part of the premises on which children shall not be allowed to remain beyond the hours hereinbefore stated: And be it further provided, that the children may be allowed to remain in any school-room attached to such factory or mill, or in any other waiting room or parts of the premises where no machinery is used, and which shall at all times be open to the inspection of any mill warden or peace officer duly appointed under the provisions of this act.

Notices by inspectors.

25. And be it further enacted, that notice of any general order or regulation applying to more than one mill or factory, made by any inspector, if published for two successive weeks in one or more newspapers published in the town, place or county where any such mill or factory is situate, shall in all cases, at the end of seven days after the second publication thereof, have the same effect in attaching a responsibility upon any offender against such order or regulation as a notice personally served upon such offender: provided nevertheless, that such notice shall not be to the exclusion of any other special notice which any inspector may deem expedient or proper.

Interior walls of every mill, &c., to be lime-washed.

26. And be it further enacted, that the interior walls, except such parts as are painted, of every mill or factory or building where the process of manufacturing is carried on, shall be limewashed, and the ceilings of all rooms which have rooms or lofts above them, and all ceilings which are plastered, shall be whitewashed once every year, unless permission to the contrary, in writing, be granted by any inspector (*f*).

An abstract of this act, and such rules and regulations as any inspector may determine, shall be hung up in mills.

27. And be it further enacted, that a copy or copies of such abstract of this act, and also such copy or copies of any regulation or regulations made in pursuance of this act, as any inspector shall direct, shall be hung up and affixed in a conspicuous part or in the several departments of every mill or factory; and such copy or copies of such abstract and of such rules or regulations, so hung up and affixed, shall be signed by the master or manager or overseer of such mill or factory; and such copy or copies shall be renewed by such master, manager or overseer so often as any inspector may direct (*g*).

Punishment for forgery of certificates.

28. And be it further enacted, that if any person shall give, sign, countersign, endorse, or in any manner give currency to any false certificate, knowing the same to be untrue, or if any person shall forge any certificate, or shall forge any signature or endorsement on any certificate, or shall knowingly and wilfully give false testimony upon any point material to any certificate of any inspector or school-master, such person shall be deemed guilty of a misdemeanor, and shall, on conviction thereof before any inspector or justice, be liable to be imprisoned for any period not exceeding two months, in the house of correction in the county, town or place, where such offence was committed.

Parents liable to penalty of 20*s.* for the employment of children beyond the legal hours, &c.

29. And be it further enacted, that in case of the employment of any child contrary to the provisions of this act, or for a longer time than is hereinbefore limited and allowed, or without a due compliance with the provisions of this act touching the education of children, or the certificates of surgeons or magistrates, the parent or parents of such child, or any person having any benefit from the wages of such child, shall be liable to a penalty (*h*) of twenty

(*f*) See also 42 Geo. 3, c. 73, s. 2, *ante*, p. 409; 7 & 8 Vict. c. 15, ss. 18, 58, *post*.

(*g*) See also 42 Geo. 3, c. 73, s. 12, *ante*, p. 411; 7 & 8 Vict. c. 15, s. 28, *post*.

(*h*) See 7 & 8 Vict. c. 15, s. 40, *post*.

shillings, unless it shall appear to the satisfaction of the justice or inspector that such unlawful employment has been without the wilful default of such parent or person so benefited as aforesaid.

Agents and servants of factory owners to be personally liable.

30. And be it further enacted, that if any offence shall be committed against this act, for which the master of any factory or mill is legally responsible, and it shall appear to the satisfaction of any justice or inspector that the same has been committed without the personal consent, concurrence or knowledge of such master, by or under the authority of some agent or servant or workman of such master, it shall be lawful for such inspector or justice to summon such agent or servant or workman before him to answer for such offence, and such agent or servant or workman shall be liable to the penalties and punishment for such offence herein provided, and such inspector or justice shall convict such agent or servant or workman in lieu of such master.

Penalties for offences against this act.

31. And be it further enacted, that if any employer of children in any factory or mill shall by himself or by his servants or workmen offend against any of the provisions of this act, or any order or regulation of any inspector made in pursuance hereof, such offender shall for such offence (except in the case of any offence for which some other penalty or punishment is specially provided) forfeit and pay any sum not exceeding twenty pounds, nor less than one pound, at the discretion of the inspector or justice before whom such offender shall be convicted: provided nevertheless, that if it shall appear to such inspector or justice that such offence was not wilful nor grossly negligent, such inspector or justice may mitigate such penalty below the said sum of one pound, or discharge the person charged with such offence (*i*).

Penalty for obstructing inspectors.

32. And be it further enacted, that if any person shall knowingly and wilfully obstruct any inspector in the execution of any of the powers entrusted to him by this act, such person shall for every such offence forfeit and pay a sum not exceeding ten pounds (*k*).

Inspectors to have same powers over constables as justices.

33. And be it further enacted, that such inspector shall have the same powers, authority and jurisdiction, over constables and peace officers, as regards the execution of the provisions of this act, as may by law be exercised by his Majesty's justices of the peace over such constables and peace officers.

Proceedings under this act may be had before any one inspector or any one magistrate.

34. And be it further enacted, that all proceedings for the enforcement of any penalty or punishment imposed by or under the authority of this act may be had before any inspector or justice of the peace acting in or for the town, place, county or division, where the offence shall be committed; and the inspector or justice before whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same either immediately or within such period as the said inspector or justice shall think fit; and in case such sum of money shall not be paid immediately or at the time so appointed, the same shall be levied by distress and sale of the goods and chattels of the offender, together with the reasonable charges of such distress; and for want of sufficient distress such offender shall be imprisoned in the common gaol for any term not exceeding one calendar month where the sum to be paid shall not exceed five pounds, or for any term not exceeding two calendar months in any

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(*i*) See 7 & 8 Vict. c. 15, s. 40, and ss. 56 to 65 inclusive, *post.*

(*k*) See 7 & 8 Vict. c. 15, ss. 40, 61, *post.*

one case, the imprisonment to cease in each of the cases aforesaid upon payment of the sum due.

Complaints to be preferred at or before the visit of the inspector; and previous notice given.

35. And be it further enacted, that all complaints for offences against this act shall be preferred at or before the time of the visit, duly notified, of any inspector next after the commission of such offence; and written notice of the intention to prefer the complaint for such offence shall by the complainant be given within fourteen days after the commission of such offence to the party or parties complained against: provided always, that no more than one penalty for a repetition of the same offence shall be recoverable, except after the service of the written notice as aforesaid (*l*).

Proviso as to penalties.

In case of partnerships, one name sufficient for summons, &c.

36. And be it further enacted, that it shall not be deemed necessary in any summons or warrant issued in pursuance of this act to set forth the name or other designation of each and every the partners in any such mill or factory, but that it shall be lawful to insert in such summons or warrant the name of the ostensible occupier, or title of the firm by which the occupier or occupiers employing the workpeople of every such mill or factory are usually designated and known.

Service of summons.

37. And be it further enacted, that the service of such summons or warrant on any occupier, principal manager, conductor or agent of any such mill or factory shall be good and lawful service.

Inspectors and justices may summon witnesses to appear and give evidence, and on neglect may commit to prison;

38. And be it further enacted, that it shall be lawful for the inspectors or any of them, or for any justice of the peace, upon any complaint, or upon any investigation under this act, without any complaint, to administer an oath to any witness, and to summon any witness forthwith to appear and give evidence before him or them, or at a time and place appointed for hearing such complaint or making such investigation, or to order such witness to be brought before him by any constable or peace officer; and if such witness shall not appear according to such summons, proof upon oath having been given of the due service of such summons, or shall resist such constable or peace officer, or shall not submit to be examined as a witness, it shall be lawful for such inspectors and justices by warrant under their hand and seal to commit such person for such non-appearance, resistance or non-submission to the county prison, or prison of the place where such offence was committed, there to remain without bail or mainprize for any time not exceeding two calendar months.

and afterwards discharge them on sufficient excuse or compliance.

39. Provided nevertheless, and be it enacted, that, except in the case of resistance to any constable or peace officer, it shall be lawful for the inspector or justice by whom such person shall have been committed to discharge such person from prison, if such person shall show any cause to such inspector or justice which shall be deemed satisfactory as an excuse for such non-appearance, or if such person shall afterwards submit himself to be examined to the satisfaction of such inspector or justice, and the order of such inspector or justice for such discharge shall be a sufficient warrant to any gaoler or prison keeper.

Convictions to be filed amongst records of county.

40. And be it further enacted, that every conviction under this act before any inspector or justice may be made according to the form in the schedule to this act annexed; which conviction shall be certified to the next general quarter sessions, there to be filed amongst the records of the county, riding or division, and shall have the force of an act of record, whether the same shall be by an inspector or by a justice of the peace for such county, riding or division;

(*l*) See 7 & 8 Vict. c. 15, s. 40, *post.*

and no conviction or other proceeding of any inspector or justice under this act shall be deemed illegal for any mere informality.

Inspector or justice may commit to prison for two months in case payment of penalty is refused or distress is insufficient.

41. And be it further enacted, that if any person who shall have been sentenced or adjudged to pay any penalty or forfeiture under this act shall neglect or refuse to pay the same, it shall be lawful for the inspector or magistrates before whom such person shall have been convicted to issue his warrant to distrain the goods and chattels of such person; and if no sufficient distress shall be found, it shall be lawful for the said inspector or magistrates, upon such fact being certified by the constable having the execution of such distress warrant, to commit such person to the house of correction or common gaol of the town, county or place where such offence was committed for any time not exceeding two months; and the said warrant of distress, commitment and certificate of the constable may be in the forms contained in the schedule to this act annexed.

As to appeal.

42. And be it further enacted, that no appeal against any conviction under this act shall be allowed, except in the case of a conviction for the forgery of any certificates, vouchers or other documents required by this act, or by any inspector under the authority of this act, neither shall any conviction, except in the case herein last excepted, be removable by *certiorari* or bill of advocation into any court whatever (*m*).

As to convictions.

Application of penalties.

43. And be it further enacted, that any justice or inspector by whom any complaint under this act is determined shall, if he so thinks fit, give to the complainant or prosecutor one-half of any penalty imposed for any offence against any of the provisions of this act, together with all costs of prosecution and conviction, and the remainder of the penalty, or the whole if he shall think fit, shall be applied as such justice or inspector may direct for the benefit of any school wherein children employed in mills or factories are educated in such township or place where such offence shall be committed: provided always, that only one penalty shall be recoverable for any one description of offence from any one person for any one day; and that it shall not be deemed necessary for the complainant or prosecutor to name in any summons the particular township in which such offence shall have been committed, but it shall be lawful to set forth in such summons the name of the parish where such offence may have been committed: provided always, that such summons shall be issued upon complaint being made upon oath (*n*).

Restriction as to penalties.

Summons.

Inspector may order constable to provide a convenient place for holding sittings.

44. And be it further enacted, that every inspector shall be and is hereby authorized to order any constable or peace officer to provide for such inspector a convenient place for holding any sitting; and the expense of providing such place shall be defrayed in the manner and proportions and by the person or persons herein appointed for the payment of any special remuneration to any constable or peace officer.

Inspectors to make annual reports.

45. And be it further enacted, that every inspector shall keep full minutes of all his visits and proceedings, and shall report the same to one of his Majesty's principal Secretaries of State twice in every year, and oftener if required, and shall also report the state and condition of the factories or mills and of the children employed therein, and whether such factories or mills are or are not conducted according to the directions of this act and of the laws of the realm: and whereas it is expedient that the proceedings, rules, orders and regulations of the several inspectors appointed under this act should be as

Proceedings of inspectors required to be uniform.

(*m*) See 7 & 8 Vict. c. 15, ss. 40, 69, 70, *post*.

(*n*) See 7 & 8 Vict. c. 15, ss. 40, 66, *post*.

nearly alike as is practicable under all circumstances, therefore such inspectors are hereby required, within three months next after they shall have commenced the execution of their several duties and powers under this act, and twice at least in every year afterwards, to meet and confer together respecting their several proceedings, rules, orders, regulations, duties and powers under this act, and at such meeting to make their proceedings, rules, orders and regulations as uniform as is expedient and practicable; and such inspectors are hereby required to make and keep full minutes of such meetings, and to report the same to such Secretary of State when they make the report hereinbefore required.

Burgh magistrates in Scotland to exercise same powers as justices of peace in England.

46. And be it further enacted, and it is hereby declared, that in all cases in which any justices or justice of the peace are or is required to act or do any thing in any manner under this act, or are or is named therein, and whenever the subject-matter of any one of the enactments or provisions of this act shall arise within that part of the United Kingdom called Scotland, the burgh magistrates shall be held to have and shall have within the limits of their own jurisdiction the same powers, duties and authorities, and which they are hereby required to exercise, as are by this act conferred upon the said justices of the peace, and are required to be exercised by them.

Act not to extend to persons on repairs.

47. Provided always, and be it enacted, that nothing in this act contained shall apply to mechanics, artisans or labourers under the prescribed ages working only in repairing the machinery or premises (*o*).

The act 1 & 2 Will. 4, c. 39, repealed, except as it repeals any other acts.

48. And be it further enacted, that from and after the first day of January one thousand eight hundred and thirty-four the act passed in the first and second years of the reign of his present Majesty, intituled "An Act to amend the Laws relating to Apprentices and other Persons employed in Cotton Mills, and to make further Provisions in lieu thereof," shall be repealed, and the same is hereby repealed, except as to any act or acts repealed by the same.

Construction of terms.

49. And be it further enacted, that any words in this act denoting the masculine gender shall be construed to extend to persons of either sex, and any words denoting the singular number shall be construed to extend to any number of persons or things, if the subject-matter or context shall admit of such an interpretation, unless such construction shall be in express opposition to any other enactment.

Public act.

50. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices and others.

The SCHEDULE to which this Act refers.

Form of Conviction.

County of [town of *as the fact may be*] to wit. } BE it remembered, that on the day of in the year A. B. [*describe the offender*] was, upon the complaint of C. D. [*or* upon the view of C. D., one of his Majesty's inspectors of factories], convicted before E. F., one of his Majesty's inspectors of factories, *or* justices of the peace, of and for, *&c.* [*as the case may be*], in pursuance of an act passed in the fourth year of the reign of his Majesty King William the Fourth, for [*describe the offence*]. Given under my hand and seal the day and year above mentioned.

(*o*) See also 7 & 8 Vict. c. 15, s. 73.

Warrant to distrain for Forfeiture.

To the Constable, *&c.*

County of } WHEREAS A. B. of in the said
to wit. } county is this day convicted before me C. D., one of his Majesty's inspectors of factories, [*or* justices of the peace in and for the said county], upon the oath of a credible witness, [*or* upon my own view, *as the case may be*], for that he the said A. B. hath [*here set forth the offence, describing it particularly in the words of the statute or rule, as near as can be*], contrary to the statute [*or* rule, *if the offence is against some rule or regulation or order of an inspector*] in that case made and provided, by reason whereof the said A.B. is adjudged to have forfeited the sum of £ to be distributed as hereinafter mentioned: These are therefore in his Majesty's name to command you to levy the said sum of £ by distress of the goods and chattels of him the said A.B.; and if within the space of four days next after such distress by you taken, the said sum of £ together with the reasonable charges of taking and keeping the same, shall not be paid, that then you do sell the said goods and chattels by you so distrained, and out of the money arising by such sale that you do pay [*according to the award of the justice*], returning the overplus, on demand, to him the said A. B., the reasonable charges of taking, keeping and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of £ that then you certify the same to me, together with this warrant. Given under my hand and seal the day of .

C. D.

Return of Constable upon Warrant of Distress where no Effects.

I, A.B., constable of in the county of do hereby certify and make oath, that by virtue of this warrant I have made diligent search for the goods of the within named and that I can find no sufficient goods whereon to levy the same. As witness my hand the day of .

A. B.

Sworn before me the day and year .

C. D.

Commitment for Want of Distress.

County of } To the constable of in the county of
to wit. } and to the keeper of the common gaol [*or* house of correction] at in the said county.

Whereas A. B. of in the said county was, on the day of convicted before me C. D. Esquire, one of his Majesty's justices of the peace in and for the said county, [*or* inspector of factories, *as the fact may be*], upon the oath of a credible witness, [*or* upon my own view, *as the case may be*], for that he [*here set forth the offence*], contrary to the statute made in the year of the reign of his Majesty King William the Fourth for [*according to the title of the act*, or contrary to a certain rule or order or regulation of his Majesty's inspectors of factories], and the said A. B. by reason thereof hath been adjudged to forfeit and pay the sum of : And whereas on the day of in the year aforesaid, I did issue my warrant to the constable of to levy the said sum of by distress and sale of the goods and chattels of him the said A. B., and to distribute

the same as in my said warrant was mentioned: And whereas it duly appears to me, upon the oath of the said constable, that he hath used his best endeavours to levy the said sum on the goods and chattels of the said A. B., but that no sufficient distress can be had whereon to levy the same: These are therefore to command you the said constable of aforesaid to apprehend the said A. B., and him safely to convey to the common gaol [*or* house of correction] at in the said county, and there deliver him to the keeper thereof, together with this precept; and I do also command you the said keeper to receive and keep in your custody the said A. B. for the space of unless the said sum shall be sooner paid, pursuant to the said conviction and warrant; and for so doing this shall be your sufficient warrant. Given under my hand and seal the day of .

C. D.

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5 & 6 Vict. c. 99.

An Act to prohibit the Employment of Women and Girls in Mines and Collieries, to regulate the Employment of Boys, and to make other Provisions relating to Persons working therein (p).

[10th August, 1842.]

Whereas it is unfit that women and girls should be employed in any mine or colliery, and it is expedient to make regulations regarding the employment of boys in mines and collieries, and to make provisions for the safety of persons working therein: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act it shall not be lawful for any owner of any mine or colliery whatsoever to employ any female person within any mine or colliery, or permit any female person to work or be therein, for the purpose of working therein, other than such as were at or before the passing of this act employed within such mine or colliery: and that from and after three calendar months from the passing of this act it shall not be lawful for any owner of any mine or colliery to employ any female person who at the passing of this act shall be under the age of eighteen years within any mine or colliery, or permit such person to work or be therein as aforesaid; and any indentures of apprenticeship whereby any female person who at the passing of this act was under the age of eighteen years shall be bound to work or be liable to be called on to work in any mine or colliery shall, at the expiration of three calendar months from the passing of this act, be absolutely void; and from and after the first day of March one thousand eight hundred and forty-three it shall not be lawful for any owner of any mine or colliery to employ any female person whatsoever within any mine or colliery, or to allow or permit any female person to work or be therein as aforesaid; and every indenture of apprenticeship, or other contract or engagement, whereby any female person whatsoever shall be bound to work or be liable to be called on to work within any mine or colliery (other than such as are before declared to be void at the end of three calendar months aforesaid) shall, from and after the said first

Females not to be employed in mines or collieries after the periods herein mentioned.

Indentures of apprenticeship of females to be void after the periods herein mentioned.

(*p*) See also 18 & 19 Vict. c. 108, *post*.

day of March one thousand eight hundred and forty-three, be absolutely void.

Males not to be employed in mines or collieries under ten years of age, &c.

2. And be it enacted, that from and after the first day of March, one thousand eight hundred and forty-three, it shall not be lawful for any owner of any mine or colliery to employ any male person under the age of ten years within any mine or colliery, or to permit any such male person to work, or be therein for the purpose of working therein, other than such as at the passing of this act shall have attained the age of nine years, and were at or before the passing of this act employed within such mine or colliery.

Appointment of inspectors of mines and collieries;

3. And be it enacted, that it shall be lawful for one of her Majesty's principal Secretaries of State, if and when he shall think fit, to appoint any proper person or persons to visit and inspect any mine or colliery; and it shall be lawful for every person so authorized to enter and examine such mine or colliery, and the works, buildings and machinery belonging thereto, at all times and seasons, by day or by night, and to make inquiry touching any matter within the provisions of this act; and the owner or occupiers of such mines and collieries, or their agents, are hereby required to furnish the means necessary for such person or persons so appointed to visit and inspect such mines and collieries, works, buildings and machinery; and every person to be so appointed shall report his proceedings in the execution of this act in such manner as may be directed by the Secretary of State; and he shall in like manner report the state and condition of the persons working in such mine or colliery, and whether or not the provisions of this act are properly observed in the mine or colliery which he shall so inspect.

who shall report as directed.

No person to be apprenticed under ten years of age, nor for longer than eight years.

4. And be it enacted, that from and after the passing of this act no person or persons shall take any apprentice who shall be bound to work, or be liable to be called on to work, or be otherwise occupied, within a mine or colliery, who shall be under the age of ten years, or for a longer term of apprenticeship than eight years, except as the apprentice of a mason, joiner, engine wright or other mechanic, whose services may be occasionally required below as well as above ground; and every indenture of apprenticeship whereby any person shall be hereafter bound contrary to the provisions of this act shall be void; and when any person who is now serving under articles of apprenticeship within any mine or colliery shall attain the age of eighteen years, he shall be discharged from such apprenticeship, and the articles of apprenticeship shall become absolutely null and void.

Indentures contrary to act void; those in force void when apprentice attains eighteen years.

Penalties for offences against this act.

5. And be it enacted, that every person or persons, body or company, offending against any of the aforesaid provisions, shall forfeit a sum not more than ten pounds nor less than five pounds, for every person employed or suffered to be in a mine or colliery contrary to the aforesaid provisions, to be sued for and recovered as after mentioned.

Penalty on parents or guardians misrepresenting ages of persons employed.

6. Provided always, and be it enacted, that if it shall appear on inquiry before any justices under the provisions of this act that any person under the age hereinbefore specified has been employed in any colliery on the representation of the parent or natural guardian of such person that he was above the age so hereinbefore specified, and if it shall appear to such justices that such person was so employed under the *bonâ fide* impression and belief on the part of the employer that he was not under the age so specified, it shall be lawful for such justices, if they see fit, to remit the said penalty as against the party employing such person, and to summon the parent or natural guardian of the person employed to appear before them

on a day to be named for the purpose, and on conviction of such parent or guardian of having wilfully misrepresented the age of the person employed, such parent or guardian shall forfeit a sum not exceeding forty shillings.

Not to affect persons employed above ground.

7. And be it enacted, that nothing hereinbefore contained shall prevent any person whatever from being employed in or about any mine or colliery, so as such employment shall be carried on above ground.

Where there are vertical or other shafts, no steam or other engine to be under the care of a person under the age of fifteen years.

8. And be it enacted, that where there shall be any entrance to a mine or colliery by means of a vertical shaft or pit or inclined plane, or where there shall be any communication within any part of a mine or colliery to any other part thereof by a vertical shaft or pit or inclined plane, then it shall not be lawful for any owner of any such mine or colliery to allow any person or persons other than a male of the age of fifteen years and upwards to have charge of any steam engine or other engine, windlass or gin, (whether driven or worked by manual labour or any other power whatsoever), or to have charge of any part of the machinery, ropes, chains or other tackle of any such engine, by or by means of which engine, machinery, ropes, chains or other tackle, persons are brought up or passed down any such vertical shaft or pit or inclined plane; and any person or persons offending against the provision last aforesaid shall for every such offence forfeit a sum not exceeding fifty pounds nor less than twenty pounds, to be recovered as after provided.

Who shall be deemed in charge of windlass worked by a horse, &c.

9. Provided always, and be it enacted, that in the case of a windlass or gin worked by a horse or other animal, the person on the bank under whose direction the driver of the animal used for such windlass or gin shall act shall for the purposes of this act be deemed and taken to be the person having the charge thereof.

Proprietors of mines, &c., not to pay wages at public houses, &c.

10. And whereas the practice of paying wages to workmen at public houses is found to be highly injurious to the best interests of the working classes: be it therefore enacted, that from and after the expiration of three months from the passing of this act no proprietor or worker of any mine or colliery or other person shall pay or cause to be paid any wages or money in respect of wages for work or labour or services done in or about any mine or colliery to any person employed in or about such mine or colliery, or to any person whatever entitled to or having authority or claiming to have authority to receive such wages, at or within any tavern, public house, beer shop or other house of entertainment, or any office, garden or place belonging thereto or occupied therewith, but all payments in respect of such wages are hereby strictly prohibited and forbidden to be made at or within such places as aforesaid, and all payments so made are hereby declared to be of no effect whatever.

Wages so paid recoverable as if not paid.

11. And be it enacted, that notwithstanding any payment of wages or money in respect of wages which shall or may be made at any such prohibited place, the person or persons to whom such wages were due or payable, or but for such payment would be due or payable, shall and may recover and receive the same in like manner as if no such payments had been made (*q*).

Penalty of 10*l.* for paying wages at public houses, &c.

12. And be it enacted, that in case any owner of any mine or colliery, or any person liable or intrusted, or employed to pay any wages or money in respect of wages for such work, labour or services aforesaid, shall, contrary to the provision lastly hereinbefore contained, pay or cause to be paid any such wages or money to any person whatever, at any such prohibited place as aforesaid, the

(*q*) See *Weaver* v. *Floyd*, 21 L. J., Q. B. 151.

person or persons so offending shall for every such offence forfeit a sum not exceeding ten pounds nor less than five pounds, to be recovered as after provided.

Agents may be summoned for acting contrary to the act without the knowledge of owners.

13. And be it enacted, that if any offence shall be committed against this act for which the owner of any mine or colliery is hereby made responsible, and it shall be made to appear to the satisfaction of any justices or sheriff, that the offence has been committed by or under the authority of some agent, servant or workman of such owner or by or under the authority of a contractor, without the personal consent, concurrence or knowledge of such owner, it shall be lawful for such justices or sheriff to summon such agent, servant, workman or contractor before them or him to answer for such offence; and such agent, servant, workman or contractor, if convicted, shall be liable to the penalties and punishment for such offence herein specified; and such justices or sheriff may convict such agent, servant, workman or contractor in lieu of such owner.

Definition of terms "owner" and "agent."

14. And be it enacted that the "owner" of a mine or colliery shall be taken to mean the immediate proprietor or lessee or occupier thereof, and all persons working any mine or colliery, or any part of any mine or colliery or any lode or seam thereof, for their own benefit or as sharers of the profit, and also all partners and companies so working such mine or colliery or any part thereof; and the words "agent" and "servant" shall be taken to mean any person receiving a salary, wages, payment or remuneration for any description of service or work performed in a mine or colliery.

Summonses need not set forth names of all the proprietors in cases of partnership.

15. And be it enacted, that it shall not be necessary in any information, summons or warrant issued under or in consequence of the provisions of this act, to set forth the name or other designation of all the partners in any mine or colliery or in the working of any such mine or colliery, but that it shall be sufficient to insert in any such information, summons or warrant the name of the ostensible proprietor, occupier, lessee or adventurer or title of the firm or company by which the owners, lessees or workers of such mine or colliery are usually designated and known.

Service of summons on agent to be deemed good service.

16. And be it enacted, that the service of any summons or warrant by delivering the same or a copy thereof at the office or counting house of any mine or colliery shall be good and sufficient service thereof on the owner of such mine or colliery (and all complaints for offences against this act shall be preferred within three calendar months next after the commission of the offence).

Recovery and application of penalties.

17. And be it enacted, that all convictions for penalties for any offence against this act may be had before two or more justices of the peace acting for the county, riding, city, borough, division or place where the offence shall happen, or before such justices or the sheriff of any county or stewartry in Scotland within which the offence may have been committed; and such penalties and the costs and charges attending the recovery thereof shall be levied by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands and seals of two or more of the said justices or under the hand of any such sheriff, rendering the overplus of such distress and sale (if any) to the party or parties after deducting the charge of making the same, which warrant such justices or sheriffs are hereby empowered and required to grant upon conviction of the offender, by confession or oath of one or more credible witness or witnesses; and the penalties, costs and charges, when so levied, shall be paid, the one half to the informer and the other half to the overseers or managers of the poor of the parish, township or place where the

offence shall have been committed, to be by such overseers or managers applied in aid of the rate or assessment raised for the relief of the poor of such parish, township or place, and in Scotland, in parishes where there shall be no assessment for the relief of the poor, as the said managers shall direct, or to her Majesty, in case there shall be no such overseer or manager.

Persons not paying penalties may be imprisoned.

18. And be it enacted, that the justices of the peace or sheriffs by whom any person shall be convicted and adjudged to pay any sum of money for any offence against this act may adjudge that such person shall pay the same, together with costs, either immediately or within such period as the said justices or sheriffs shall think fit; and that in default of payment at the time appointed, and in the event of no sufficient distress of the goods and chattels of such person being found within the limits of the jurisdiction of the said justices or sheriffs, such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the said justices or sheriffs shall seem meet, for any time not exceeding two calendar months, the commitment to be determinable upon payment of the amount of the penalty and costs.

Inhabitants of parishes not incompetent as witnesses.

19. And be it enacted, that no inhabitant of any parish, township or place shall be deemed an incompetent witness in any suit, action, information, complaint, appeal, prosecution or proceeding to be had, made, prosecuted or carried on under the authority of this act for any offence committed within such parish, township or place, by reason of such person being rated or assessed to, or liable to be rated or assessed to, or being otherwise interested in, the rates or assessments of any such parish, township or place.

Distress not unlawful for want of form.

20. And be it enacted, that where any distress shall be made for any sum or sums of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in any proceedings relating thereto, nor shall the party or parties distraining be deemed a trespasser or trespassers from the beginning on account of any irregularity which shall be afterwards done by the party or parties distraining, but the person or persons aggrieved by such irregularity may recover full satisfaction for the special damage in an action on the case, to be brought in some of the courts of record at Westminster or Dublin, or by action raised or complaint preferred in the court of session in Scotland: provided always, that no plaintiff or plaintiffs shall recover in any action for any such irregularity, trespass or wrongful proceeding, if tender of sufficient amends for any such special damage shall be made by or on behalf of the party or parties who shall have committed or caused to have been committed any such irregularity or wrongful proceeding before such action or complaint brought; and in case no such tender shall have been made it shall be lawful for the defendant or defendants in any such action, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he or they shall see fit; whereupon such proceedings or orders and judgments shall be had, made and given in, and by such court as in other actions where the defendant is allowed to pay money into court.

Appeal to quarter sessions.

21. And be it enacted, that any person who shall think himself or herself aggrieved by any conviction by any justices of the peace under this act may appeal to the next court of general or quarter sessions of the peace which shall be holden not less than fifteen days after the day of such conviction for the county, stewartry, riding, city, borough, division or place wherein the cause of complaint shall have

arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within seven days after such conviction, and seven clear days at the least before such session, and shall also either remain in custody until the session, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said session of the peace, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given and such recognizance being entered into the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such session shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and all judgments, determinations and proceedings of such justices not appealed from as aforesaid. and of such sheriff or quarter sessions, shall be final, and not subject to review by any process of law or court whatever, any law or usage to the contrary notwithstanding.

Convictions not removable by *certiorari*.

22. And be it enacted, that no conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed, by *certiorari* or otherwise, into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Act may be amended, &c., this session.

23. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament.

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6 & 7 VICT. c. 40.

An Act to amend the Laws for the Prevention of Frauds and Abuses by Persons employed in the Woollen, Worsted, Linen, Cotton, Flax, Mohair and Silk Hosiery Manufactures, and for the further securing the Property of the Manufacturers and the Wages of the Workmen engaged therein. [1st August, 1843.]

Whereas an act was passed in the session of Parliament held in the eighth and ninth years of King William the Third, intituled "An Act for the further Encouragement of the Manufacture of Lustrings and Alamodes within this Realm, and for the better preventing the Importation of the same, whereby (amongst other matters therein contained) certain penalties, forfeitures and punishments therein referred to were imposed upon persons embezzling or otherwise unlawfully selling or receiving, as therein is mentioned, silk delivered by the silk manufacturers to be worked up:" and whereas an act was passed in the first year of the reign of her late Majesty Queen Anne, intituled "An Act for the more effectual preventing the Abuses and Frauds of Persons employed in Working up the Woollen, Linen, Fustian, Cotton and Iron Manufactures of this Kingdom:" and whereas the said act was made perpetual by an act passed in the

8 & 9 Will. 3, c. 36.

1 Ann. st. 2, c. 18.

9 Ann. c. 30. ninth year of the reign of her said late Majesty Queen Anne, intituled "An Act for reviving and continuing an Act made in the First Year of Her Majesty's Reign for the more effectual preventing Abuses and Frauds of Persons employed in the Working up the Woollen, Linen, Fustian, Cotton and Iron Manufactures of this
12 Geo. 1, c. 34. Kingdom:" and whereas an act was passed in the twelfth year of the reign of his late Majesty King George the First, intituled "An Act to prevent unlawful Combinations of Workmen employed in the Woollen Manufactures, and for better Payment of their Wages:"
13 Geo. 2, c. 8. And whereas an act was passed in the thirteenth year of his late Majesty King George the Second, intituled "An Act to explain and amend an Act made in the First Year of the Reign of her late Majesty Queen Anne, intituled 'An Act for the more effectual preventing the Abuses and Frauds of Persons employed in the Working up the Woollen, Linen, Fustian, Cotton and Iron Manufactures of this Kingdom, and also for extending the said Act to the Manufacture of Leather:'" and whereas an act was passed in the
22 Geo. 2, c. 27. twenty-second year of the reign of his late Majesty King George the Second, intituled "An Act for the more effectual preventing of Frauds and Abuses committed by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair and Silk Manufactures, and for preventing unlawful Combinations of Journeymen Dyers and Journeymen Hotpressers, and of all Persons employed in the said several Manufactures, and for the better Payment
17 Geo. 3, c. 56. of their Wages:" and whereas another act was passed in the seventeenth year of the reign of his late Majesty King George the Third, intituled "An Act for amending and rendering more effectual the several Laws now in being for the more effectual preventing of Frauds and Abuses by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair and Silk Manufactures; and also for making Provisions to prevent Frauds by Journeymen Dyers:" and whereas an
32 Geo. 3, c. 44. act was passed in the thirty-second year of his late Majesty King George the Third, intituled "An Act for extending the Provisions of an Act made in the Thirteenth Year of the Reign of his present Majesty, intituled 'An Act to empower the Magistrates therein mentioned to settle and regulate the Wages of Persons employed in the Silk Manufactures within their respective Jurisdictions, to Manufactures of Silk mixed with other Materials, and for the more effectual Punishment of Buyers and Receivers of Silk purloined and embezzled by Persons employed in the Manufacture thereof:'" and whereas the provisions of the said acts have not been effectual to prevent frauds, embezzlements and abuses by persons employed in the woollen, linen, cotton, flax, mohair and silk hosiery manufactures, and it is expedient to repeal so much of the said recited acts as relates to the said manufactures, and to make further provisions in lieu thereof, as well for the benefit and encouragement of trade and manufactures as for the security of the property of manufacturers and the wages of the workmen engaged in the said manufactures: be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the commencement of this
So much of the said acts as relates to the woollen, linen, cotton, act, so much of the said recited acts or any of them as relates to the woollen, linen, cotton, flax, mohair and silk manufactures, or any of them, or any manufactures whatsoever made of wool, cotton, flax, mohair or silk materials, whether the same be or be not mixed with

each other or with any other materials, shall, so far as respects the manufactures, trades, occupations and employments hereinafter mentioned, be and the same are hereby repealed save and except so far as the same may have repealed any former acts or enactments. flax, mohair and silk manufactures repealed.

2. And be it enacted, that if any person whosoever entrusted with any woollen, worsted, linen, cotton, flax, mohair or silk materials for the purpose of being prepared, worked up or manufactured either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed with, by or under him, or for any purpose or work connected with manufacture or incidental thereto, or any parts, branches or processes thereof, or any tools or apparatus for manufacturing the said materials, shall sell, pawn, purloin, embezzle, secrete, exchange or otherwise fraudulently dispose of the same materials, tools or apparatus, or any part thereof, he shall, upon being thereof lawfully convicted by the oath of the owner of such materials, tools or apparatus, or any part thereof, or of any other credible witness or witnesses before two or more justices of the peace, forfeit the full value of the same, and also forfeit such penalty not exceeding ten pounds, together with costs as to the said justices shall seem meet; and every such forfeiture and penalty shall be applied under the direction of the convicting justices in manner following (that is to say), in the first place in making such satisfaction to the party injured as the said justices shall think proper, and the remainder, if any, shall be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act; and in default of payment of such forfeiture and penalty with costs immediately on conviction, or within such period as the justices so convicting may direct, the said justices may issue their warrant to distrain and sell the goods and chattels of the person so convicted for the amount thereof and costs; and the proceeds of any distress, after paying the penalty, forfeiture and costs, and also the costs of such distress, shall be paid over to the person convicted; but if no sufficient distress shall appear or shall be found whereon to levy the said penalty, forfeiture and costs, the said justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or house of correction, to be there imprisoned with or without hard labour, as to the said justices shall seem meet, for any term not exceeding three calendar months, unless the amount of such forfeiture and penalty with costs, or so much thereof as shall not have been paid previously to the commencement of such imprisonment, be sooner paid. Persons convicted of pawning or embezzling any materials herein particularized to forfeit the value of the same with penalty and costs. Application of penalty and forfeiture. Distress warrant on non-payment. Commitment in default of sufficient distress.

3. And be it enacted, that if any person whosoever entrusted with any woollen, worsted, linen, cotton, flax, mohair or silk materials for the purpose of being prepared, worked up or manufactured, either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed with, by or under him, or for any purpose or work connected with manufacture or incidental thereto, or any parts, branches or processes thereof, or with any tools or apparatus for manufacturing the said materials, shall neglect or delay to return the said materials, tools or apparatus, or any part thereof, for the space of fourteen clear days after being required so to do by the party entrusting him therewith, or by some person on his behalf, by notice in writing to be served upon or left at the last or usual place of abode or business of such person (unless prevented by some reasonable and sufficient cause to be allowed by the justices before whom he shall be brought), then and in every such case all or so much or so many of the said Persons neglecting to return materials within a prescribed time to be subject to the same punishment as for embezzlement.

materials, tools or apparatus as shall not be returned to the person so entrusting him therewith within the time aforesaid shall be deemed to be embezzled by the person so neglecting or delaying to return the same; and the person so neglecting or delaying to return the same shall for every such offence be liable to be proceeded against for embezzlement in the same manner and subject to the same forfeiture and penalty with costs, and to be applied in the same manner, as are respectively hereinbefore prescribed and imposed in respect to persons selling, pawning, purloining, embezzling, secreting, exchanging, or otherwise fraudulently disposing of the said materials.

Persons knowingly purchasing or receiving embezzled materials or tools guilty of a misdemeanor, punishable as after mentioned.

4. And be it enacted, that any person who shall purchase or take in pawn, or who in any other way shall receive into his premises or possession any woollen, worsted, linen, cotton, flax, mohair or silk materials, and whether the same or any part of the said materials be or be not wholly or partially wrought, made up or manufactured into merchantable wares, or any tools or apparatus for manufacturing the same, knowing that such materials, tools or apparatus are purloined or embezzled or fraudulently disposed of, or that the person from whom he shall purchase, take in pawn, or receive the same is fraudulently or unlawfully disposing thereof, or knowing such person to be employed or entrusted by any other person or persons to work up, either by himself or by or with others, the materials so purchased, taken in pawn, or received for any other person or persons, and not having first obtained the consent of the person or persons so employing or entrusting him therewith, shall, on conviction by the oath of the owner or of any other credible witness or witnesses, be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned.

Persons knowingly selling, &c., embezzled materials or tools guilty of a misdemeanor, punishable as after mentioned.

5. And be it enacted, that if any person shall sell, pawn, pledge, exchange or otherwise unlawfully dispose of, or offer to sell, pawn, pledge, exchange or otherwise dispose of any such materials, tools or apparatus as aforesaid, knowing the same to have been so purloined or embezzled or received from persons fraudulently disposing thereof as aforesaid, he shall, on conviction by the oath of the owner of such materials, tools or apparatus, or any part thereof, or of any other credible witness or witnesses, be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned.

Justices empowered to issue warrant for apprehension of offenders against this act, and to commit them for trial.

6. And be it enacted, that on proof on oath that there is just cause to suspect that any such materials, tools or apparatus as aforesaid have been fraudulently sold, pawned, pledged, purloined or embezzled by the person to whom the same were entrusted, or that any such materials, tools or apparatus have been purchased or received, or sold, pawned, pledged, exchanged or otherwise unlawfully disposed of or offered for sale, pawn, pledge, exchange or other disposal by any person knowing the same to have been purloined or embezzled, or received from some person fraudulently disposing thereof, it shall and may be lawful for any one justice of the peace, and such justice is hereby required to issue his warrant for apprehending any such person and bringing him before him or some other justice of the peace for examination; and if, upon such examination, the charge of having fraudulently sold, pawned, purloined, embezzled or otherwise fraudulently disposed of any such materials, tools or apparatus, or of having purchased, or received, or sold, pawned, pledged, exchanged or otherwise fraudulently disposed of, or of having offered for sale, pawn, pledge, exchange or other disposal any such materials, tools or apparatus, knowing them to have been purloined, or embezzled, or received from some person fraudulently

disposing thereof, shall be supported by evidence to raise a strong presumption of guilt, such justice shall commit such person to the common gaol or house of correction, in order that he may be brought forward for trial at the next petty sessions, unless he enter into such bail with two sufficient sureties as may be required for his appearance before such court on any day to be fixed by such justice.

Workmen neglecting to fulfil their engagements, not finishing their work, or leaving without notice.

7. And be it enacted, that if any person entrusted, employed or contracting to prepare, work up or manufacture, or to have prepared, worked up or manufactured, either by himself or by any person or persons to be employed by or under him, or by himself jointly with any person or persons to be employed by or under him, any woollen, worsted, linen, cotton, flax, mohair or silk materials, shall not prepare, work up or manufacture, or cause to be prepared, worked up or manufactured, the said materials, and return the same within seven clear days after the time which shall have been agreed upon between such person and the owner of the said materials or other the person entrusting him therewith, and in case no such time shall have been so agreed upon, then within seven clear days after being required so to do (unless prevented by some reasonable and sufficient cause to be allowed by the justices before whom he shall be brought), or shall leave or return such materials without having performed, as he could and ought to have done, the work he was employed to perform thereon or thereto, and without the consent of the person entrusting him with such materials as aforesaid, or shall damage the same, or if any person shall contract or engage to work or be employed to do or perform, or to have done or performed, any work in any of the said manufactures or connected therewith or incidental thereto, or any parts, branches or processes thereof, either by himself or by any person or persons to be employed by or under him, and whether such contract or engagement shall be to work or be employed for any person exclusively, or for all or part of his time, or for specific work or otherwise, and whether such person is to be paid according to the value or amount of the work done, the time employed, or in any other manner whatsoever, and shall neglect to fulfil such contract or engagement, or absent himself from such work or employment before such notice (if any) as shall have been agreed upon between the said parties for determining the said contract or engagement shall have expired, or without giving such notice, or contrary to the terms of such contract or engagement (unless prevented as aforesaid, to be allowed as aforesaid), then and in every such case such person, being thereof lawfully convicted on oath before two or more justices of the peace, shall forfeit any sum not exceeding two pounds as to such justices shall seem meet, and also, in case the said materials shall be damaged, the amount of the injury done thereto, to be ascertained by the said justices, together with costs; and every such forfeiture shall be applied under the direction of the justices so convicting in manner following (that is to say), in the first place in making such satisfaction to the party injured as the said justices shall think proper, and the remainder, if any, shall be applied in the same manner as any penalty under this act; and in default of payment of such forfeiture and costs immediately on conviction, or within such period as the justices so convicting shall direct, the said justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or house of correction, there to be imprisoned with or without hard labour, as to the said justices shall seem meet, for any term not exceeding two calendar months, unless the amount of such forfeiture and costs be sooner paid.

Penalty.

Justice empowered to grant search warrants.

8. And be it enacted, that upon proof on oath before a justice of the peace, that there is reasonable cause to suspect that any person has in his possession or on his premises any such materials, tools or apparatus as aforesaid, which have been purloined, embezzled or otherwise fraudulently disposed of, it shall be lawful for the said justice, and such justice is hereby required to grant his warrant to search the dwelling-house and premises of such person, and if any such property shall be found therein to cause such materials, tools or apparatus, and the person in whose possession or on whose premises the same shall be found, to be brought before him or some other justice of the peace to be dealt with in the same manner as any person brought before a justice under the enactment next hereinafter contained.

Peace officers to apprehend suspected persons.

9. And be it enacted, that every peace officer and constable, and every watchman duly appointed by law, during such time as he shall be on duty, shall and may apprehend or cause be apprehended any person whom he may reasonably suspect of having or carrying or in any way conveying, at any time after sunsetting and before sunrising, any such materials, tools or apparatus as aforesaid, suspected to be purloined, embezzled or otherwise fraudulently disposed of, and shall lodge such person, together with the property, in a police office or other place of security, in order that he may be brought before a justice of the peace as soon as convenient, who is hereby empowered to discharge such person, or to order his detention until the next court of petty sessions, unless he enter into such bail with two sufficient sureties as may be required for his appearance before such court on any day to be fixed by the said justice, and if the person so apprehended in the act of committing any such offence as aforesaid, or of conveying any such property as last aforesaid, shall not produce before the said court the person duly entitled to dispose of such property from whom he bought or received the same, or shall not give an account to the satisfaction of the said court that the property is honestly come by, then the person so apprehended shall be deemed and adjudged guilty of a misdemeanor, and be punished in manner hereinafter mentioned, although no proof shall be given as to whom such property belongs.

Persons apprehended, and not proving that the property is honestly come by to be punishable.

Adjournment of time for trial allowed on prisoner finding bail.

10. And be it enacted, that it shall be competent for the party accused, in all proceedings brought under the authority of this act, to move for and obtain an adjournment of the time fixed for trial for such a reasonable time as may appear to the court to be necessary for the party accused to produce the person, duly entitled to sell or dispose of the said property, of whom he bought or received the same, or evidence respecting the same, but the party accused and requesting such adjournment shall be detained in custody or committed to prison, unless he enter into such bail, with two sufficient sureties as shall be required for his appearance before such court, at such time and place as shall be appointed.

Punishment of persons convicted of misdemeanor.

11. And be it enacted, that any person who shall be deemed and adjudged guilty of a misdemeanor agreeably to any of the provisions of this act, shall, in addition to being deprived, without compensation, of any such materials, tools and apparatus which have been purloined, embezzled or otherwise fraudulently disposed of, and which shall have been found in his possession, forfeit any sum not exceeding twenty pounds for each offence, together with costs, upon being thereof lawfully convicted, by the oath of one or more credible witness or witnesses, before two or more justices of the peace; and every such forfeiture shall be applied under the direction of the justices so convicting in manner following (that is to say), in the first

place, in making such satisfaction to the party injured as the said justices shall think fit, and the remainder (if any) shall be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act, and in default of payment of such forfeiture and penalty with costs, immediately on conviction, or within such period as the court shall direct, any justice or justices may issue his or their warrant to distrain and sell the goods and chattels of the person so convicted for the amount thereof and costs, and the proceeds of any distress, after paying the forfeiture and costs and also the costs of such distress, shall be paid over to the person convicted: but if no sufficient distress shall appear or shall be found whereon to levy the said forfeiture and costs, any justice or justices may either immediately, or at any time after such conviction, commit any person so convicted to the common gaol or house of correction, to be imprisoned there with or without hard labour, as to the said court shall seem meet, for any term not exceeding four calendar months, unless the amount of such forfeiture and costs, or so much thereof, as shall not have been paid previously to the commencement of such imprisonment, be sooner paid.

Disposal of unclaimed property which has been seized.

12. And be it enacted, that where no proof shall be given, at the time of conviction, of the ownership of property found in the possession of a person convicted under this act, the justices or court shall cause the property so found to be deposited in some safe place for any time not exceeding thirty days, and shall, if the property be of sufficient value to pay the expenses thereof, order an advertisement to be inserted in one or more of the public newspapers of the town or city where or nearest the place where the same was found, and by fixing a notice on some public place, describing such property and where the same may be inspected, or in case of the said property not being of sufficient value to pay the said expenses, then by fixing such notice as aforesaid only; and in case any person shall prove his own or his employer's ownership or property therein, upon oath, to the satisfaction of a justice, restitution of such property shall be ordered to the owner thereof, after paying the reasonable cost of removing, depositing, advertising and giving notice of the same; but if no ownership be proved to such property, the justice shall, at the termination of thirty days, order such property to be sold, and after deducting the charges aforesaid with the charges of sale, shall order the residue to be applied in the same manner as is hereafter directed for the disposal of any other penalty under this act.

Owner of materials may inspect shops, &c., of persons employed.

13. And be it enacted, that it shall be lawful for the owner of any such materials as aforesaid, or any other person duly authorised by him, or other the person who shall have so entrusted such materials from time to time as occasion shall require, to demand leave of entrance and enter, at all reasonable hours in the daytime, into the shops or outhouses of any person employed to work up or manufacture, either by himself or by any other person under him, any of the said materials, or other place or places where the work shall be carried on, and there to inspect the state and condition of such materials; and in case of refusal or neglect by any such person or persons so employed to permit such entrance or inspection, such person shall, for so refusing to permit such entrance or inspection, forfeit any sum not exceeding twenty shillings as the justices before whom he shall appear or be brought, shall think proper, to be applied in the same manner as is hereinafter directed for the disposal of any other penalty under this act: provided always, that nothing herein contained shall authorize any such owner or other person as aforesaid to inspect any

Penalty for refusal.

Proviso.

frame, tools or apparatus wherewith such materials are worked up, in case such frame, tools or apparatus comprise any new invention or improvement not disclosed to the public.

Warrant may be granted by justice on complaint on oath that person is about to abscond.

14. And be it enacted, that if any manufacturer, agent or any other person in his employment or service, shall make oath before a justice of the peace that any such materials, tools or apparatus as aforesaid, have been entrusted to any person as aforesaid, and that he has absconded, or that the deponent has just cause to suspect and does suspect that such person is about to abscond, it shall be lawful for such justice, and he is hereby required to issue his warrant to apprehend such person and bring him before him or some other justice of the peace, and if such person shall have absconded, or shall not forthwith give security, to be approved of by the said justice, for the return, in a finished state, of all such materials so entrusted to him within such time as shall be then agreed on, such justice shall, by warrant, order any constable, with his assistants, to enter the house or other premises of such person and take possession of all such materials, tools or apparatus so delivered to him as aforesaid, and to bring the same before the said justice or any other justice, when such justice shall direct the same to be delivered to the owner or his agent or servant, or other person duly authorized by him, and shall forthwith release the person in custody; but if all such materials, tools or apparatus shall not be found in the house or other premises or the possession of such person, or shall not be produced before such justice, such person shall be deemed and taken to have purloined or embezzled such materials, tools or apparatus, or such part thereof as shall not be found or produced, and shall be liable to any of the punishments awarded for such offence.

Receiving goods in fictitious name.

15. And be it enacted, that if any person shall receive any of the aforesaid materials in a fictitious name, in order to be manufactured, every such person so offending, and being convicted thereof on the oath of one or more credible witness or witnesses before two or more justices, shall, for every such offence, be liable to the same punishment as is hereinbefore directed in respect to persons not fulfilling their engagements.

Justice to issue warrant to constable to take possession of property entrusted to any person committed for embezzlement, &c.

16. And be it enacted, that in cases where any person shall have been committed for purloining, embezzling or fraudulently disposing of all or any part of such materials, tools or apparatus as aforesaid which may have been entrusted to him, or shall have been convicted of any other offence against any of the provisions of this act, it shall be lawful for the justice who so committed such person or for any justice or court before whom he has been convicted for that or any other offence, and he or they is or are hereby required to issue his or their warrant authorizing a constable, with his assistants, to enter the house and premises of such person, and take possession of all such property so entrusted as shall be found therein, and to bring the same before the said justice or court, when the said justice or court shall direct the same to be delivered to the manufacturer, agent or person duly authorized to receive the same.

Recovery of wages and sums due for work.

17. And be it enacted, that if any manufacturer or other party employing, contracting or engaging with any person for any work in any of the said manufactures or connected therewith or incidental thereto or any parts, branches or processes thereof, and whether such work is to be performed by the said person or by any person or persons to be employed by or under him or by himself jointly with any person or persons to be employed with, by or under him, and whether the contract or engagement shall be to work or be employed for such manufacturer or other party exclusively or for all or part of

his time or for specific work or otherwise, and whether such person is to be paid according to the nature or amount of the work done, the time employed or any other manner, shall not from time to time pay and discharge all such sums of money, wages and hire as shall be justly due and payable to any such person, it shall be lawful for a justice of the peace, on complaint made for that purpose, to summon such manufacturer or other party to appear at a time and place to be named in such summons, and for any two or more justices of the peace to hear and determine such complaint, and order payment of such sum as shall appear to such justices to be justly due and payable, together with costs for loss of time and recovering the same, and in default of payment immediately or within such period as the said justices shall direct, the said justices shall issue their warrant to levy the same by distress and sale of the goods and chattels of the said manufacturer or other party, and the said justices, if they shall think fit, may also, by order in writing, authorize such person to return his work unfinished, in which case such person shall not be liable to the penalties awarded by this act.

Frames, &c. not belonging to workmen not liable to be seized for rent or debt owing by workmen.

18. And be it enacted, that no frame, loom or machine, materials, tools or apparatus which shall be entrusted for the purpose of being used or worked in any of the said manufactures or any work connected therewith or incidental thereto or any parts, branches or processes thereof, whether such frame, loom or machine, materials, tools or apparatus shall or shall not be rented or taken by the hire, shall at any time or times hereafter be distrained or seized or be liable to be distrained or seized for rent or for debt or under any execution or other proceedings whatever, unless the rent be due or the money be owing by the owner of the said frame, loom or machine, or of the said materials or tools or apparatus aforesaid, or of any part thereof respectively.

In case of refusal to restore frames, &c., unlawfully seized, justice may order their restoration.

19. And be it enacted, that if any landlord or other person by virtue of any distress, warrant, execution or other proceedings for rent in arrear or money due or alleged to be due by any person whomsoever, shall distrain, seize, carry off, sell or otherwise dispose of any frame, loom or machine, materials, tools or apparatus belonging to any other person which shall have been entrusted for the purpose of being used or worked in any of the said manufactures, or any work connected therewith or incidental thereto or any parts, branches or processes thereof, and whether the same shall or shall not be rented or taken by the hire, or shall distrain, seize, carry off, sell or otherwise dispose of any materials as aforesaid, or any tools or apparatus as aforesaid, belonging to any other person, and shall refuse to restore possession of all such frames, looms, machines, tools or apparatus to the person owning, letting or entrusting the same when demanded by him or some person duly authorized by him of the said landlord or other person or the person acting as agent or bailiff of such landlord or other person, it shall and may be lawful to and for any justice of the peace, upon complaint on oath before him, to summon the said landlord or other person to appear before any two or more justices of the peace to answer the said complaint, and, on proof of the said offence, the said justices may thereupon order the property so seized, distrained, carried off or sold, to be forthwith restored, and issue their warrant to a constable or constables empowering him or them to seize the said property wherever the same shall be found, and deliver possession thereof to the person owning, letting or entrusting the same, and to levy by distress and sale of the goods of the said landlord or other person the costs of obtaining the said order and recovering and obtaining possession of the said

property ; and in case the said property cannot be found and seized within a time not exceeding twenty-one days, to be limited in the said warrant, or in case the said property shall have been damaged by the same having been distrained, seized, carried off or sold, then it shall be lawful for such two justices or any other two justices, on proof thereof (the said landlord or other person having been first summoned by a justice) to issue their warrant to levy by distress and sale of the goods and chattels of such landlord or other person the full value of the said property or the amount of such damage as the case may be, together with all costs of recovering and levying the same.

Penalty for obliterating mark on machine.

20. And be it enacted, that if any person or persons shall obliterate, efface or alter the owner's name or initials, or other distinguishing mark on any frame, loom or machine, or any bar or part thereof, or the moulds thereof, without the order or authority of the owner thereof, he shall, on conviction thereof before two justices of the peace, forfeit any such sum not exceeding two pounds as such two justices shall order and direct, to be applied in the first place in paying the costs of the proceedings before such justices, and the surplus, if any, to the party injured ; and in default of payment of such forfeiture immediately on conviction or within such period as the justices so convicting shall direct, then the said justices may either immediately or at any time after such conviction commit any person so convicted to the common gaol or house of correction, there to be imprisoned with or without hard labour as to the said justices shall seem meet, for any term not exceeding two calendar months, unless the amount of such forfeiture be sooner paid.

Power to award costs to defendant.

21. And for the discouragement of frivolous and vexatious informations and prosecutions under this act, be it enacted, that it shall be lawful for any justices or court of petty sessions before whom any case under this act is tried to award costs to the defendant with an allowance for his loss of time in case of acquittal, to be paid by the prosecutor, and also if it shall appear to such justices or court that the charge was made from a malicious, vexatious or frivolous motive, or in case the party shall be charged with embezzlement of materials by reason of any deficiency in the weight of the materials which he shall have returned to the person by whom they were entrusted to such party as compared with the weight of the materials received, and it shall be proved upon the hearing of the case that such materials were knowingly and fraudulently delivered to the party charged whilst in a damp state, so that the apparent weight thereof was thereby increased, it shall be lawful for such justices or court to award to the defendant such further sum of money not exceeding twenty pounds as to such justices or court shall seem fit, to be paid by such prosecutor as a compensation for the injury done; and, in default of payment, such costs and allowances and compensations may be levied by distress and sale of the prosecutor's goods.

Mode of proceeding to enforce appearance.

22. And be it enacted, that where any person shall be charged on oath with any offence punishable under this act, one justice may receive the original information and summon the person charged to appear before any two justices of the peace at a time and place to be named in such summons, and if he shall not appear accordingly, then the justices there present may either proceed to hear and determine the case *ex parte*, or any of such justices may issue a warrant for apprehending such person and bringing him to answer the said charge before any two or more justices, or the justice before whom the charge shall be made may, if he shall so think fit, issue such warrant in the first instance without any previous summons, and

commit the person so charged to prison in order that he may be brought forward for trial (unless he enter into such bail as may be required by such justice for his appearance at such time and place as shall be appointed), and the justices before whom the person charged shall appear or be brought shall proceed to hear and determine the case; and after adjudication all and every the subsequent proceedings to enforce obedience thereto, whether respecting the penalty, forfeiture, distress, imprisonment, costs or other matter or thing relating thereto, may be enforced by any one of the said justices. Proceedings after adjudication.

23. And be it enacted, that every summons to be granted by a justice of the peace under this act may be served by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat and explaining the purport thereof to such inmate. Service of summons.

24. Provided always, and be it enacted, that every complaint and prosecution under this act shall be commenced within six calendar months after the commission of the offence, unless the offending party shall have in the mean time left the country and not otherwise, and that the informer or prosecutor, or any person aiding, abetting, party or privy to the commission of the offence charged, shall in every case under this act be deemed a competent witness to prove the offence. Limitation of time within which proceedings to be commenced. Witness.

25. And be it enacted, that in all complaints, warrants, proceedings or prosecutions under this act any justice or justices of the peace and the court of petty sessions for the county, city, borough or place where the offence shall be committed or the complaint arise, or where the said materials, frame, loom, machine, tools or apparatus shall be given out or entrusted, lent or hired, or where the manufacturer, master or employer shall carry on his trade or business, shall have full power and authority to act and to hear and determine such complaint, warrant, proceeding or prosecution, and do all other matters incident thereto: provided always, that in all convictions or adjudications under this act one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation or employment to which this act extends, and shall not be the father, son or brother of any such person. What justices to have jurisdiction. Proviso.

26. And be it enacted, that all forfeitures and penalties upon convictions under this act not specially provided for shall be paid to the sheriff or other proper officer of the county, city, borough or place in which such conviction shall take place for her Majesty's use, and shall be returned to the court of quarter sessions under the provisions of an act passed in the third year of the reign of his late Majesty King George the Fourth, intituled "An Act for the more speedy return and levying of Fines, Penalties and Forfeitures, and Recognizances estreated." Application of penalties. 3 Geo. 4, c. 46.

27. And be it enacted, that in every case of summary conviction or adjudication under this act not specially provided for, where the sum forfeited or adjudged to be paid, or which shall be imposed as a penalty by any justice or justices of the peace, together with costs, if awarded, which costs such justice or justices is and are hereby authorized to award if he or they shall think fit in any proceeding, adjudication or conviction under this act, shall not be paid immediately, or within such period as the said justice or justices shall direct, or where a warrant of distress shall be issued and no sufficient distress shall be found, it shall be lawful for the convicting justice or justices to commit the offender to the common gaol or house of correction, there to be imprisoned with or without hard labour, according to the discretion of the said justice or justices, for any term not Scale of imprisonment on summary convictions not specially provided for.

exceeding two calendar months, when the amount of the sum forfeited or adjudged to be paid, or of the penalty imposed, together with costs, shall not exceed five pounds, and for any term not exceeding three calendar months in any other case, unless the amount and costs be sooner paid.

Form of conviction.

28. And be it enacted, that the justices before whom any person shall be convicted of any offence against this act may cause the conviction to be drawn up on paper or parchment in the following form of words, or in any other form of words to the like effect, and with such variations as the case shall require; (that is to say),

BE it remembered, that on the day of to wit. in the year of our Lord at in the of C. D. is convicted before us, A. B. and J. P., two of her Majesty's justices of the peace for the said for that he the said C. D. [*here specify the offence, and the time and place where the same was committed, as the case may be*], and we do adjudge that the said C. D. shall for the said offence forfeit and pay [*here state the penalty actually imposed, or the penalty and also the sum adjudged as the value of the articles or the amount of the injury, as the case may be*], and also pay the sum of for costs [*if so ordered*]; and we direct that the sum of shall be paid to E. F. the party aggrieved, on the day of [instant *or* next ensuing], and that the sum of shall, on the day of [instant *or* next ensuing], be paid and applied according to the direction of the statute in such case made and provided [*or as the case may be*], and that the sum of for costs shall be paid to the complainant [*if so ordered*]. Given under our hands and seals the day and year first above written.

Appeal to quarter sessions in certain cases.

29. And be it enacted, that in all cases of summary conviction under this act where the sum adjudged to be paid shall exceed twenty shillings, or the imprisonment shall exceed one calendar month, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be held for the county, city, borough or place where such conviction shall have been made, (such person at the time of such conviction giving to the justices so convicting, or to the justice so presiding at the court of petty sessions at which such conviction shall take place, notice in writing of his intention to appeal and also entering into a recognizance at the time of such notice with two sufficient sureties conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall by the court be awarded), and upon such notice being given and such recognizance being entered into, the justice or justices before whom the same shall be entered into shall liberate such person if in custody, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein with or without costs to either party as to the court shall seem meet, and in case of the dismissal of the appeal or the confirmation of the conviction, the said court shall order and adjudge the offender to pay such costs, if any, as shall be awarded, and shall, if necessary, issue process for enforcing payment of the same: and it shall be lawful for the said Court, or on the production of a certificate under the hand of the clerk of the peace for the said county, city, borough or place, or his deputy, for any justice or justices of the peace for such county, city, borough or place, either immediately or at any time thereafter to issue a warrant of distress and sale, or a warrant for the apprehension and commitment of such offender for such period of time as together with the

days during which such person so convicted shall have been imprisoned, if any, previously to being discharged by reason of such appeal, shall amount to the same period or term of imprisonment for which such person was adjudged to be imprisoned at the time of conviction, or to issue a warrant of distress and sale, and if there be no sufficient distress a warrant of apprehension and commitment, as the case may require, in like manner in all respects as any justice or justices could or might have done in case no notice of appeal had been given.

Proceedings not to be quashed for want of form, or removed by *certiorari*.

30. And be it enacted, that no order or conviction, or proceedings touching the same respectively, nor adjudication made or appeal therefrom shall be quashed for want of form or be removed by *certiorari* or otherwise into any of her Majesty's superior courts of record, and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same, and that where any distress shall be made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser on account of any defect or want of form in the summons, warrant, conviction, warrant of distress or other proceedings relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for the special damage (if any) upon (*r*) an action on the case.

Limitation of actions against persons acting in execution of this act.

31. And be it enacted, that for the protection of persons acting in the execution of this act all actions and prosecutions for damage to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was or is charged to have been committed, and shall be commenced within two calendar months after the fact committed, and not otherwise, and notice in writing of such action and of the cause thereof shall be given to the defendant one calendar month at least before the commencement of the action, and in any such action the defendant may plead the general issue, or in case of any action of replevin may avow generally that the goods and chattels in question were taken under and by virtue of this said act, and may give this act and the special matter in evidence at the trial to be had thereupon, and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, nor if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or avowant: provided always, that in all such actions of damages the plaintiff shall be bound to establish not merely that damages have been suffered by him, but that the same have been wilfully and maliciously caused by the defendant or avowant.

General issue.

Tender of amends.

Offences committed before this act.

32. And be it enacted, that nothing in this act contained shall extend to any person for any offence committed against the said hereinbefore recited acts, or any of them, before the passing of this act, but every such offender shall and may be prosecuted and punished in the same manner as if this act had not been made.

This act not to extend to Scotland or Ireland.

33. And be it enacted, that nothing in this act contained shall extend to Scotland or Ireland or be construed to extend to repeal any act or statute or part thereof now in force and not repealed by this act.

(*r*) *Sic.*

To what trades this act shall extend.

34. And be it enacted, that this act shall not extend or be construed to extend to any manufacture, trade, occupation or employment, except only the manufactures (*s*), trades, occupations and employments following (that is to say), the manufacture of woollen, worsted, linen, cotton, flax, mohair or silk materials in, on or by the stocking frame, warp machine or any other machine employed in the manufacture of framework knitted or looped fabrics, and every trade, occupation, operation or employment whatsoever connected with or incidental to the manufacture of stockings, gloves, and other articles of hosiery.

Construction of terms.

35. And be it enacted, that in all cases under this act the singular is to include the plural, and the masculine the feminine, and in an indictment or information for offences against the property of partners, joint stock companies or trustees, it shall be sufficient to lay the ownership in the name of one partner or trustee and another or others; that the words "*woollen, worsted, linen, cotton, flax, mohair or silk materials*," shall be construed to extend to any of the said materials mixed with each other or with any other material or materials, and that the words "*manufacture*" and "*work*" shall extend to all trades, occupations, operations and employments whatsoever connected with or incidental to the manufacture of any of the said materials or any parts, branches or processes thereof, and likewise to such materials whether the same or any part thereof be or be not, in the whole or in part, first wrought, made up or manufactured, or converted into merchantable wares.

Commencement of act.

36. And be it enacted, that this act shall commence on the first day of August, one thousand eight hundred and forty-three.

Act may be amended, &c.

37. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

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7 & 8 Vict. c. 15.

An Act to amend the Laws relating to Labour in Factories (*t*).

[6th June, 1844.]

Whereas the laws relating to labour in factories require to be amended: be it enacted by the Queen's most excellent Majesty, by

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(*s*) See *R.* v. *Button*, 11 Q. B. 941.

(*t*) See also 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, *post*; 16 & 17 Vict. c. 104, *post*; 19 & 20 Vict. c. 38, *post*. By 9 & 10 Vict. c. 40, after reciting 3 & 4 Will. 4, c. 103, and 7 & 8 Vict. c. 15, and that the said acts had been construed to apply to ropeworks; and it is expedient to relieve ropemakers from the effect of such construction and of the said acts: it is declared and enacted, "that no ropery, ropewalk or ropework, in which machinery moved by steam, water or other mechanical power is not used for drawing or spinning the fibres of flax, hemp, jute or tow, but only for laying or twisting or other process of preparing or finishing the lines, twines, cords or ropes, and which has no internal communication with any buildings or premises forming or forming part of a mill or factory within the meaning of the said acts, except such as is necessary for the transmission of power, shall be deemed to be a mill or factory within the provisions of the said acts or of either of them, and that nothing in the said acts or in either of them shall be deemed to apply to the employment of children, young persons or women in any such ropery, ropewalk or ropework."

and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that this act shall take effect from and after the first day of October, in the year one thousand eight hundred and forty-four, except any provisions for the taking effect of which any other time shall be hereinafter specially limited, all which last mentioned provisions shall take effect from and after such time as shall be hereinafter specially mentioned in that behalf. Commencement of act.

2. And be it enacted, that after the passing of this act no inspector of factories shall have power in that capacity to act as a magistrate, or to make rules, regulations and orders, as authorized by an act, hereinafter called "the Factory Act," passed in the fourth year of the reign of his late Majesty, and intituled "An Act to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom," except as hereinafter mentioned; and that no inspector or person appointed to superintend the execution of the provisions of the Factory Act and of this act under the direction of an inspector, hereinafter called a sub-inspector, shall be liable to serve upon any jury, or to serve any parochial or municipal office, so long as he shall continue to hold the office of inspector or sub-inspector. Restriction on power of inspectors and sub-inspectors. 3 & 4 Will. 4, c. 103. Their exemption from certain duties.

3. And be it enacted, that every inspector and sub-inspector shall have power to enter every part of any factory at any time, by day or by night, when any person shall be employed therein, and to enter by day any place which he shall have reason to believe to be a factory, and to enter any school in which children employed in factories are educated, and at all times to take with him into any factory the certifying surgeon of the district hereinafter mentioned, and any constable or other peace officer whom he may need to assist him, and shall have power to examine, either alone or in the presence of any other person, as he shall think fit, every person whom he shall find in a factory or in such a school, or whom he shall have reason to believe to be or to have been employed in a factory within two months next preceding the time when he shall require him to be examined touching any matter within the provisions of this act, and the inspector or sub-inspector may, if he shall see fit, require such person to make and sign a declaration of the truth of the matters respecting which he shall have been or shall be so examined; and every inspector and sub-inspector shall have power to examine the registers, certificates, notices and other documents, kept in pursuance of this act; and every person who shall refuse to be examined as aforesaid, or who shall refuse to sign his name or affix his mark to a declaration of the truth of the matters respecting which he shall have been examined, or who shall in any manner attempt to conceal or otherwise prevent any child or other person from appearing before or being examined by an inspector or sub-inspector, or who shall prevent or knowingly delay the admission of an inspector or sub-inspector to any part of a factory or school, or shall prevent an inspector or sub-inspector from examining any register, certificate, notice or other document kept in pursuance of this act, shall be deemed guilty of wilfully obstructing the inspector or sub-inspector in the execution of the powers entrusted to him. Power of inspectors and sub-inspectors.

4. And be it enacted, that the provisions of an act passed in the twenty-fourth year of the reign of King George the Second, intituled "An Act for the rendering Justices of the Peace more safe in the Execution of their Office, and for indemnifying Constables and others acting in obedience to their Warrants," as amended by any subsequent act, so far as they relate to rendering justices of the peace Protection of inspectors and sub-inspectors. 24 Geo. 2, c. 44.

more safe in the execution of their office, shall extend to protect the inspectors and sub-inspectors in the exercise of their duties under this act.

Office of factory inspectors.

5. And be it enacted, that a proper office, to be called "The Office of the Factory Inspectors," shall be provided in London or Westminster for the use of the inspectors, and for the preservation of the factory records and all documents relating to the several proceedings under this act; and one of her Majesty's principal Secretaries of State shall appoint from time to time such clerks and servants as may be deemed necessary to carry on the business of the said office, and may at pleasure remove them or any of them; and the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland shall fix the salaries of the clerks and servants in fit proportion according to the duties they may have to perform.

Management of the office, and regulating the duties of the inspectors, &c.

6. And be it enacted, that one of her Majesty's principal Secretaries of State, or the inspectors, with the approval of such principal Secretary, from time to time may make regulations for the management of the said office, and for regulating the duties of the several inspectors and sub-inspectors, and of the clerks and servants of the said office, in the execution of this act, so that they be not contrary to the provisions herein contained; and the regulations so made and approved shall be binding on the said inspectors and sub-inspectors, clerks and servants respectively.

Persons beginning to occupy a factory to send notice to the Office of Factory Inspectors.

7. And be it enacted, that after the passing of this act every person, on beginning to occupy a factory, shall within one month send, addressed "To the Office of the Factory Inspectors, London," a written notice, containing the name of the factory, the place, township, parish and county where it is situated, the post office to which he desires his letters to be addressed, the nature of the work, the nature and amount of the moving power, and the name of the firm under which the business of the factory is to be carried on.

Certifying surgeons to be appointed by an inspector.

8. And be it enacted, that after the passing of this act any inspector shall have power to appoint a sufficient number of persons practising surgery or medicine to be certifying surgeons, for the purpose of examining persons who shall be brought before them to obtain the surgical certificates of age required by the Factory Act and by this act, and of giving the said certificates, and shall from time to time make regulations for their guidance, and shall in every such appointment specify the factories or district for which each surgeon is appointed, and may from time to time annul any such appointment, and in like manner make another or others; but every appointment of a certifying surgeon, and every order annulling such appointment, may be revoked by the Secretary of State, on appeal made to him for either purpose; and the inspector of the district shall make known the name of the certifying surgeons so from time to time appointed or discontinued to the occupiers of the factories in that district in such manner as to him shall seem fit; but no surgeon, being the occupier of a factory, or having a beneficial interest in any factory, shall be a certifying surgeon.

Form of surgical certificate.

9. And be it enacted, that the certificates of age required by the Factory Act or by this act, herein called surgical certificates, shall be given according to the form and directions contained in the Schedule (A.) annexed to this act; and the certificates given by any such certifying surgeon shall be as valid as if countersigned by an inspector, justice of the peace or burgh magistrate; and the name of every person for whom a certificate of age is required by the Factory Act or by this act, and the date of the first day of employment or

re-employment of such person shall be registered in the form and according to the directions given in the Schedule (B.) annexed to this act, before it shall be lawful to employ such person in a factory: provided always, that no surgical certificate shall be required for any young person above the age of sixteen years.

Certificates not given by certifying surgeon must be by persons duly authorized, and countersigned by a magistrate.

10. And be it enacted, that no such surgical certificate given by any person who is not an appointed certifying surgeon shall be of any force, unless it is given by a person duly authorized by an university or college, or other public body having authority in that behalf, to practise surgery or medicine, and countersigned, according to the form and directions given in the Schedule (A.) to this act annexed, by some justice of the peace, not being the occupier of a factory, and not being the father, son or brother of the occupier of a factory; and no person shall countersign any such surgical certificate in the absence of the person named therein, or without proof that the person brought before him is the same to whom the certificate was granted.

Surgical certificates to be given at the factory.

11. And be it enacted, that no person shall grant any surgical certificate required by the Factory Act or by this act, except upon personal inspection of the person named therein; and no certifying surgeon shall examine any person for the purposes of this act, or sign or issue any such surgical certificate, elsewhere than at the factory where such person is to be employed, unless for special cause, to be allowed by an inspector; and if a certifying surgeon shall refuse to grant a certificate of age for any person presented to him for such examination, he shall give, when required, instead of such certificate, a paper specifying under his hand the reasons for such refusal, in the form and directions given in the Schedule (A.) to this act annexed.

Agreement between mill occupier and certifying surgeon.

12. And be it enacted, that if the occupier of a factory shall agree in writing with the certifying surgeon of a district for the payment to be made by the occupier of the factory to the certifying surgeon for the examination of persons for whom surgical certificates are required by the Factory Act or by this act, and if the terms of such agreement shall be in conformity with such regulations for the guidance of the surgeons as shall be made by the inspector of the district, and shall be countersigned by the inspector in token of such conformity, all penalties which may be incurred by any party for breach of such agreement may be recovered as other penalties under this act may be recovered, and shall be applied as other penalties under this act are directed to be applied, and no such agreement shall be liable to any stamp duty.

Inspector may fix surgeon's fees.

13. And be it enacted, that an inspector shall fix the amount of fees to be paid by the occupier of a factory, and the times when such fees shall be paid to the certifying surgeon, and also the times when such certifying surgeon shall visit a factory, provided he shall be required to fix such fees and visits by the occupier of a factory; and the fees so to be fixed by the inspector shall not in any case where the surgeon shall examine more than one person exceed one shilling for each person who shall be presented to him at the factory by the mill owner or his agent to be examined, together with sixpence for every half mile that the distance of the factory from the residence of such surgeon shall exceed one mile; and such fees, including mileage, shall not be less than one shilling and shall in no case exceed five shillings for any one visit, except when upon such visit the certifying surgeon shall examine for the said certificates of age more than ten persons who may be brought before him as aforesaid, in which case

he shall receive sixpence for each person that he may so examine, instead of all other fees; and in any case where a factory is situated within the distance of one mile from the residence of a certifying surgeon the fee for such factory shall not exceed two shillings and sixpence for each visit, except when at any one visit he shall examine for the said certificates of age more than five persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other fees; and no certifying surgeon shall receive more than sixpence for any certificate which he may be allowed by an inspector, as hereinbefore provided, to sign or issue otherwise than at the factory where the person is to be employed; and the occupier of any factory shall pay such fees to the certifying surgeon at the time of signing such certificates, or at any other time when he may be directed by the inspector to do so; and the occupier of such factory may deduct the fee or any part thereof, not exceeding in any one case the sum of three-pence, from the wages of the person for whom the certificate may have been granted; but in any case where such agreement as aforesaid has been executed between an occupier of a factory and the certifying surgeon the amount named in such agreement shall be instead of the fees fixed by any inspector in virtue of this act: provided always, that no certifying surgeon shall be required to visit any factory situated within three miles of his residence oftener than once in each week, or to visit any factory situated at a greater distance than three miles oftener than once in every fortnight, unless with the consent of the occupier of the factory.

New surgical certificate not required for persons at present employed.

Inspectors and sub-inspectors may annul certificates.

14. And be it enacted, that no person who shall be employed in a factory at the time when this act shall come into force, under a surgical certificate granted under the Factory Act, shall be required to have a new surgical certificate, in the form and manner provided by this act, so long as he shall continue in the same factory; but every inspector and sub-inspector may annul any surgical certificate granted under this act, and any surgical certificate granted before the passing of this act, by writing across the surgical certificate the word "annulled," with his name, and the date of annulling such certificate; provided that in either case he shall have reason to believe the real age of the person mentioned therein to be less than that mentioned in the certificate, or provided the certifying surgeon of the district shall, upon reference made to him, deem such person to be then of deficient health or strength, or by disease or bodily infirmity incapacitated for labour, or liable to be injured by continued employment: and no certificate so annulled shall be valid in respect of the person named therein for the purposes of this act from the day when the certificate shall have been so annulled; and the production of the certificate shall be evidence that the certificate was annulled on the day so stated.

Certificates of real age may be obtained.

15. And be it enacted, that in case any person shall be desirous of proving the real age of any person for whom a certifying surgeon shall have refused to grant a certificate of age for the purposes of this act, or whose surgical certificate any inspector or sub-inspector shall have annulled, the inspector or sub-inspector shall, on demand, give to such person a requisition under his hand, in a form to be approved of by the inspectors and by the registrar general, for the production of a duly certified copy of the entry of the birth or baptism of such person, provided the party demanding the same shall declare the names of such person and of his parents, with the place where and the year in which he was born or baptized, which particulars shall be set forth in the requisition; and every party to whom such requisi-

tion shall have been given shall be entitled, upon payment of one shilling, to receive, on personal application, or on application in writing, in such form and under such regulations as shall be approved of by the inspectors and registrar general, from any minister, registrar or other person having the care of any register of births or baptisms in which the birth or baptism of such person is entered, a duly certified copy of the entry in such register, which shall be indorsed on the aforesaid requisition, and shall be signed by the minister, registrar, or other person having charge of such register; and such payment of one shilling shall be instead of all other fees or payments to which such minister, registrar or other person shall be entitled; and if the said certified copy, proving the age of the person named therein to be such as to entitle him to have the surgical certificate required, shall be produced to the certifying surgeon of the district, he shall examine the same, and if it shall appear to him that the said certified copy has not been altered or falsified in any manner, the certifying surgeon shall thereupon, without further fee or reward, give a surgical certificate in the form provided for that case in Schedule (A.) to this act annexed, and shall write the word "Examined" upon the certified copy of the entry of the birth or baptism which he shall have received, with his signature, and the date of such signature, and shall send such certified copy by the post to the sub-inspector of the district, who shall send a receipt for the same by post to the said surgeon, and shall keep such certified copy of the entry of the birth or baptism, for future reference, if necessary; and if any inspector of factories shall require a certified copy of the entry of the birth of any person employed in any factory from the office of the registrar general, he, or any person deputed by him, shall, on producing a requisition in the form hereinbefore provided, be entitled to examine the indexes to the registers in the general register office, and to receive such certified copy indorsed on the requisition without the payment of any fee; but no certified copy of the entry of any birth or baptism issued in consequence of any such requisition hereinbefore provided shall be admissible in evidence in any court or for any purpose, save for the purposes of this act: provided always, that in those cases in which a surgical certificate shall have been refused or annulled in consequence of deficient health or strength, or by reason of disease or bodily infirmity, the inspector or sub-inspector shall not sign the requisition hereinbefore mentioned, and such person shall not be employed on proof of real age only.

Certificate to be obtained before the person is employed, and to serve only for one factory.

16. And be it enacted, that before employing any person requiring a surgical certificate under the Factory Act as amended by this act, the occupier of the factory shall obtain the surgical certificate, save as hereinafter excepted, and shall keep, and be bound to produce every such certificate, when required, to the inspector or sub-inspector; and no surgical certificate shall be valid except for employment at the factory for which it was originally granted, or, if granted by a certifying surgeon, at any other factory in the occupation of the same person who is occupier of the factory for which the certificate was originally granted, provided such other factory be in the district of the certifying surgeon who granted the certificate, and the certificate be produced in the factory where the person named in the certificate is at work; and the certifying surgeon, as often as he shall visit a factory for the purpose of granting certificates, shall enter in the register of workers the date of his visit, and the other particulars set forth in the form and according to the directions given in Schedule (B.) to this act annexed.

Surgical certificates may be dispensed with for seven or thirteen days.

17. Provided always, and be it enacted, that no occupier of any factory shall be liable to any penalty for employing any person in any manner not contrary to the other provisions of the Factory Act as amended by this act, without a surgical certificate, for any time not exceeding seven working days, or, when the certifying surgeon shall reside more than three miles from the factory, for any time not exceeding thirteen working days, provided all surgical certificates for that factory be granted only by the certifying surgeon appointed for that factory; but this enactment shall not be construed to dispense with the certificate of school attendance, or to authorize the employment of any person in respect of whom the certifying surgeon shall have refused to grant such surgical certificate.

Limewashing and other washing of the interior of factories.

18. And be it enacted, that after the passing of this act it shall not be necessary to limewash the walls of any mill, factory or building, or to whitewash the ceilings of any rooms therein, otherwise than is hereinafter provided; and that all the inside walls, ceilings or tops of rooms, whether plastered or not, and all the passages and staircases of every factory, which shall not have been painted with oil once at least within seven years, shall be limewashed once at least within every successive period of fourteen months, to date from the period when last whitewashed; and all the inside walls and ceilings or tops of rooms in which children or young persons are employed, and which are painted with oil, shall be washed with hot water and soap once at least within every successive period of fourteen months, as aforesaid.

Protection of workers in wet-spinning flax mills.

19. And be it enacted, that after the expiration of six months from the date of this act coming into operation no child or young person shall be employed in any part of a factory in which the wet-spinning of flax, hemp, jute or tow is carried on, unless sufficient means shall be employed and continued for protecting the workers from being wetted, and, where hot water is used, for preventing the escape of steam into the room occupied by the workers.

Mill-gearing not to be cleaned while in motion.

20. And be it enacted, that no child or young person shall be allowed to clean any part of the mill-gearing in a factory while the same is in motion for the purpose of propelling any part of the manufacturing machinery; and no child or young person shall be allowed to work between the fixed and traversing part of any self-acting machine while the latter is in motion by the action of the steam engine, water-wheel or other mechanical power.

Machinery to be guarded.

21. And be it enacted, that every fly-wheel directly connected with the steam engine or water-wheel or other mechanical power, whether in the engine house or not, and every part of a steam engine and water-wheel, and every hoist or teagle, near to which children or young persons (*u*) are liable to pass or be employed, and all parts

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(*u*) In *Coe* v. *Platt*, 2 L. M. & P. 488; *S. C.* 6 Exc. 752, it was held that the subsequent part of this section is not confined to children and young persons, or even to persons employed in the factory. And it also held, that a declaration in an action brought for injuries sustained in consequence of non-compliance with this section, must show that the shaft was *in motion for some manufacturing process;* and as the declaration in that case did *not* do so, judgment was arrested. This decision was upheld in the Exchequer Chamber, 7 Exc. 460. Thereupon the declaration was amended and the case tried again before Alderson, B., at the Liverpool Spring Assizes, 1852. The evidence showed, that *the shaft on the ground floor* of the building was in motion, and *was* in use for the purpose of working the machinery, but the *shaft in the*

of the mill-gearing in a factory, shall be securely fenced; and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are *in motion* by the action of the steam engine, water-wheel or other mechanical power *for any manufacturing process* (*x*).

Notice to be given of accidents causing bodily injury.

22. And be it enacted, that if any accident shall occur in a factory which shall cause any bodily injury to any person employed therein which shall have been of such a nature as to prevent the person so injured from returning to his work in the factory before nine of the clock of the following morning, the occupier of the factory, or in his absence his principal agent, shall within twenty-four hours of such absence send a notice thereof in writing to the surgeon appointed to grant certificates of age for the district in which the factory is situated, in which notice the place of residence of the person injured, or the place to which he may have been removed, shall be stated; and the surgeon shall send a copy of such notice to the sub-inspector of the district by the first post after the receipt thereof.

Certifying surgeon to examine into the causes and extent of accidents, and report thereon

23. And be it enacted, that if a certifying surgeon shall receive notice as aforesaid that an accident has occurred which has caused bodily injury to any person employed in a factory for which he has been appointed to grant certificates of age, and that it has been of such a nature as to have prevented the person so injured from returning to his work in the factory the following morning, he shall with the least possible delay proceed to the said factory, and make a full investigation as to the nature and cause of such bodily injury, and shall within the next twenty-four hours send to the inspector of the district a report thereof, a copy of which report, together with any other information which he may receive respecting the said accident, the inspector of the district shall send to the office of the factory inspectors as soon as conveniently may be; and the certifying surgeon, for the purpose of such investigations only, shall have the same power, authority and protection as an inspector, and shall also have power to enter any room in any building to which the injured person may have been removed; and for such investigation the said surgeon shall receive a fee not exceeding ten shillings, or such part thereof, not being less than three shillings, as the inspector of the district may consider a reasonable remuneration to the surgeon for his trouble, which fee shall be paid as other expenses incurred under this act.

Prosecution for compensation by an inspector.

24. And be it enacted, that one of her Majesty's principal Secretaries of State, on the report and recommendation of an inspector, may empower such inspector to direct one or more actions to be

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upper floor, and *by which the accident was occasioned was not in use* for *that* purpose, although in motion, from the difficulty of disconnecting it from the main shaft. It was contended, that the upper shaft *formed a portion* of the lower; and that, therefore, at the time of the accident, it was in motion for the purpose of working machinery within this section; Alderson, B., however, intimated a contrary opinion, and, the jury having assessed damages, directed a verdict to be entered for the defendant; giving the plaintiff leave to move to enter the verdict for her for the amount found by the jury. But the rule granted for that purpose was discharged, 7 Exc. 923. See also *Caswell* v. *Worth*, 5 E. & B. 849; *Doel* v. *Sheppard*, 5 E. & B. 856. In consequence of which, 19 & 20 Vict. c. 38, *post*, was passed.

(*x*) *Ibid.*

brought in the name and on behalf of any person who shall be reported by such inspector to have received any bodily injury from the machinery (*y*) of any factory, for the recovery of damages for and on behalf of such person (*z*).

Application of compensation when recovered.

25. And be it enacted, that any damages which shall be recovered in any action so directed to be brought shall be paid, as soon after they are received as conveniently may be, to the person in whose behalf they have been recovered, or shall be otherwise settled for the use and benefit of the said person in such manner as shall be approved of by the Secretary of State; and in case a verdict shall be found for the defendant, or judgment shall be recovered against the plaintiff, or the plaintiff shall be nonsuited, the defendant shall have the like remedies for his costs against the inspector as he might have had against the plaintiff; and all charges and expenses incurred in bringing any such action, beyond what are recovered from the defendant, and not otherwise provided for, shall be paid as other expenses incurred under this act are to be paid.

For ensuring regularity in the observance of time.

26. And be it enacted, that the hours of the work of children and young persons in every factory shall be reckoned from the time when any child or young person shall first begin to work in the morning in such factory (*a*), and shall be regulated by a public clock, or by some other clock open to the public view, to be approved of in either case in writing under the hand of the inspector or sub-inspector of the district.

Registers to be kept in every factory.

27. And be it enacted, that registers shall be kept in the factory to which they relate, by the occupier of every factory, according to the forms and directions given in Schedule (B.) to this act annexed; and every inspector shall have power to require such occupier to send to him, in such manner as may be directed in the requisition, any extracts from such registers, and any other information with relation to the persons employed in the factory, which may be requisite to facilitate the performance of the duties of such inspector in any inquiry made under the authority of the Factory Act or of this act; but no information so sent by the occupier of any factory which is not contained in the registers, certificates and other documents required by this act to be received or kept shall be admissible in evidence in any proceeding against him for the recovery of any penalty; and the registers, certificates and other documents required by this act to be received or kept shall be forthwith produced to the inspector or sub-inspector, on his demanding to examine the same, at any time when the factory is at work.

An abstract of this act, and certain notices, to be hung up in every factory.

28. And be it enacted, that it shall not be necessary to hang up in any mill or factory any copy of any abstract of the Factory Act, or of any regulations made in pursuance of the said act, other than is hereinafter provided; and that such abstract of the Factory Act as amended by this act as shall be directed by one of her Majesty's principal secretaries of state shall be fixed on a moveable board, and be hung up as soon as received by the occupier of the factory or his agent in the entrance of the factory, and in such other places as the inspector or sub-inspector of the district may direct; and notices of the names and addresses of the inspector and sub-inspector of the district in which the factory is situated, of the name

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(*y*) See 19 & 20 Vict. c. 38, s. 5, *post*.

(*z*) The provisions in this and the following section do not take away the right of the *party injured* to sue for damages, *Caswell* v. *Worth*, 5 E. & B. 849; *S. C.* 25 L. J., Q. B. 121.

(*a*) See further 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, *post*.

and address of the surgeon who grants certificates of age for the factory, of the clock by which the hours of work in the factory are regulated, of the times of beginning and ending daily work of all persons employed in the factory, and any alteration thereof, of the times of the day and amount of time allowed for their several meals, of all time lost which is intended to be recovered, and of all time which shall be recovered, together with every other notice required by this act, written or printed in legible characters, and fixed on moveable boards, (each particular notice being signed by the occupier of every factory or his agent,) shall be hung up in the entrance of the factory, where they may be easily read by the persons employed in the factory, and in such other places as the inspector or sub-inspector of the district may direct, and whence they shall not be removed while the factory is at work; and in case any such abstract of the Factory Act as amended by this act, or notice, shall become illegible in any part, the occupier of the factory shall cause a new copy thereof to be provided and hung up as aforesaid; but the notice of lost time need not remain after the whole of the lost time intended to be recovered shall have been recovered; and every notice required to be hung up shall be in the forms and according to the directions given in the Schedule (C.) hereunto annexed (*b*).

Children may be employed in factories at eight years of age.

29. And be it enacted, that every child who shall have completed his eighth year, and shall have obtained the surgical certificate required by this act of having completed his eighth year, may be employed in a factory in the same manner and under the same regulations as children who have completed their ninth year; but no child under eight years of age shall be employed in any factory.

Time of children's work.

30. And be it enacted, that no child shall be employed in any factory more than six hours and thirty minutes in any one day, save as hereinafter excepted, unless the dinner time of the young persons in such factory shall begin at one of the clock, in which case children beginning to work in the morning may work for seven hours in one day; and no child who shall have been employed in a factory before noon of any day shall be employed in the same or any other factory, either for the purpose of recovering lost time or otherwise, after one of the clock in the afternoon of the same day, save in the cases when children may work on alternate days, or in silk factories more than seven hours in any one day, as hereinafter provided (*c*).

How children may be employed on three alternate days of the week.

31. And be it enacted, that in any factory in which the labour of young persons is restricted to ten hours in any one day it shall be lawful to employ any child ten hours in any one day on three alternate days of every week, provided that such child shall not be employed in any manner in the same or in any other factory on two successive days, nor after half-past four of the clock in the afternoon of any Saturday: provided always, that the parent or person having direct benefit from the wages of any child so employed shall cause such child to attend some school for at least five hours between the hours of eight of the clock in the morning and six of the clock in the afternoon of the same day on each week day preceding each day of employment in the factory, unless such preceding day shall be a Saturday, when no school attendance of such child shall be required:

(*b*) See *Ryder* v. *Mills*, 3 Exc. 853; but see now 13 & 14 Vict. c. 54, s. 2.

(*c*) *Ryder* v. *Mills*, 3 Exc. 853; and *infra*, note (*d*). See also 16 & 17 Vict. c. 104, *post*.

provided also, that on Monday in every week after that in which such child began to work in the factory, or any other day appointed for that purpose by the inspector of the district, the occupier of the factory shall obtain a certificate from a schoolmaster, according to the form and directions given in the schedule (A.) to this act annexed, that such child has attended school as required by this act; but it shall not be lawful to employ any child in a factory more than seven hours in any one day, until the owner of the factory shall have sent a notice in writing to the inspector of the district of his intention to restrict the hours of labour of young persons in the factory to ten hours a day, and to employ children ten hours a day; and if such occupier of a factory shall at any time cease so to employ children ten hours a day he shall not again employ any child in his factory more than seven hours in any one day until he shall have sent a further notice to the inspector in the manner hereinbefore provided.

Women to be employed as young persons.

32. And be it enacted, that no female above the age of eighteen years shall be employed in any factory save for the same time and in the same manner as young persons may be employed in factories (*d*); and that any person who shall be convicted of employing a female above the age of eighteen years for any longer time or in any other manner shall for every such offence be adjudged to pay the same penalty as is provided in the like case for employing a young person contrary to law: provided always, that nothing herein or in the Factory Act contained as to certificates of age shall be taken to apply to females above the age of eighteen years.

Provision for recovering lost time by stoppage of the machinery.

33. And be it enacted, that no time lost by accident or otherwise in any factory shall be made good or worked up by extension of ordinary hours of labour, save as is hereinafter provided; and that in any factory in which any part of the machinery is moved by the power of water the time which shall have been lost by stoppages from want of water, or from too much water, may be recovered in manner following, within six months next after the stoppage, between the hours specified in the Factory Act as those within which time lost by drought or excess of water may be recovered; and in order to recover time so lost any child or young person may be employed one hour in each day more than the time to which the ordinary daily labour of children and young persons respectively is restricted by law, except on Saturday; but it shall not be lawful so to recover any lost time until a notice shall have been sent by post to the sub-inspector of the district in which the factory is situated, stating the intention so to recover time that has been lost. nor unless a notice according to the form and directions given in the schedule (C.) to this act annexed shall have been previously fixed up in the entrance of the factory, and in such other places as an inspector or sub-inspector may direct; and such notice shall be kept so fixed up during the whole time while the lost time is in course of being recovered; and such notice shall be kept in a book as directed in the said schedule (C.); nor shall lost time be so recovered on two successive days, unless the amount of time recovered on any one day shall be inserted before nine of the clock in the morning of the following day in the last mentioned notice.

Provision for recovering time lost by partial stoppages.

34. And be it enacted, that in any factory in which any part of the machinery is moved by the power of water, when the stream is so diminished by drought or swollen by flood during any part of the day that any part of the manufacturing machinery driven by the

(*d*) See further, 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54, *post.*

water-wheel has been stopped by reason of such drought or flood, the young persons who would have been employed at such machinery may recover such lost time during the night next following the said day, unless the said day be Saturday: provided always, that no such young person shall be employed during any twenty-four consecutive hours for a greater number of hours than that to which the ordinary daily labour of such young persons in factories is otherwise restricted by law; and that no young person so employed in the night shall work more than five hours, without an entire cessation from work of at least thirty minutes; but it shall not be lawful to recover any such lost time unless a notice according to the form and directions given in the Schedule (C.) to this act annexed shall have been previously fixed up in the entrance of the factory, and in such other places as an inspector or sub-inspector may direct, and unless such notice be kept so fixed up during the whole time while the lost time is in course of being recovered; and such notice shall be kept in a book as directed in the said Schedule (C.) (*e*).

Work to cease on Saturday at half-past four.

35. And be it enacted, that no child or young person shall be employed in a factory, either to recover lost time or for any other purpose, on any Saturday after half-past four of the clock in the afternoon.

Additional regulations as to meal times.

36. And be it enacted, that the times allowed for meal times as provided by the Factory Act shall be taken between the hours of half-past seven in the morning and half-past seven in the evening of every day, and one hour thereof at the least shall be given, either the whole at one time or at different times, before three of the clock in the afternoon; and no child or young person shall be employed more than five hours before one of the clock in the afternoon of any day without an interval for meal time of at least thirty minutes; and during any meal time which shall form any part of the hour and a half allowed for meals no child or young person shall be employed or allowed to remain in any room in which any manufacturing process is then carried on; and all the young persons employed in a factory shall have the time for meals at the same period of the day, unless some alteration for special cause shall be allowed in writing by an inspector (*f*).

Additional regulations as to holidays.

37. And be it enacted, that each of the half holidays required by the Factory Act to be given shall comprise not less than one half of the day, and during such time no young person shall be employed in the factory; and that at least four of such half holidays shall be given between the fifteenth day of March and the first day of October in each year to every young person who shall be employed in the factory during the whole of such period; but no cessation from work shall be deemed a half holiday, unless notice of such half holiday, and of the time of such cessation from work, shall have been fixed up on the preceding day in the entrance of the factory, and in any other place that the inspector or sub-inspector may direct; and that in addition to such eight half days no child or young person shall be allowed to work in any factory on Christmas Day or Good Friday, in England or Ireland; and in Scotland no child or young person shall be allowed to work on any day the whole of which is set apart by the Church of Scotland for the observance of the sacramental fast in the parish in which the factory is situated.

(*e*) See 13 & 14 Vict. c. 54, s. 5, *post*.

(*f*) *Ryder* v. *Mills*, 3 Exc. 853; 13 & 14 Vict. c. 54, *post*; 16 & 17 Vict. c. 104, *post*.

Additional regulations for the attendance of children at school.

38. And be it enacted, that, save as herein otherwise provided, the parent or person having any direct benefit from the wages of any child employed in a factory shall cause such child to attend some school on the day after the first employment of such child, and thenceforth on each working day of every week during any part of which the said child shall continue in such employment; so that on every such day, except in the cases hereinafter provided, such child shall attend school during at least three hours after the hour of eight of the clock in the morning and before the hour of six of the clock in the evening: provided always, that any child attending school after one of the clock in the afternoon shall not be required to remain in school more than two hours and a half on any one day between the first day of November and the last day of February, and no child shall be required to attend school on any Saturday, and the non-attendance of every such child shall be excused on every day on which such child shall be certified by the schoolmaster to have been prevented by sickness or other unavoidable cause from attending the school, and during any holiday or half holiday authorized by this act, or by consent in writing of the inspector of the district in which the factory is situated, or where the school-room is situated within the outer boundary of the factory at which such child is employed, on every day on which the school shall be closed in consequence of the said factory ceasing to be at work during the whole day.

Occupier of factory to obtain school certificate,

39. And be it enacted, that no schoolmaster's tickets or vouchers shall be required or valid other than is hereinafter provided, and that the occupier of every factory in which a child is employed shall on Monday in every week after the first week in which such child began to work in the factory, or on any other day appointed for that purpose by an inspector, obtain a certificate from a schoolmaster, according to the form and directions given in the Schedule (A.) to this act annexed, that such child has attended school as required by this act during the foregone week; and such occupier shall keep such certificate for six months after the date thereof, and shall produce the same to any inspector or sub-inspector when required during such period, and shall, when required by the inspector for the district, pay to the schoolmaster of such child, or to such other person as the said inspector may direct, towards the expenses of educating such child, such sum as the inspector may require, not exceeding two-pence per week, and shall be entitled to deduct from the wages payable to such child any such sum as he shall have been required to pay for such expenses, not exceeding the rate of one-twelfth part of the weekly wages of such child: provided always, that if an inspector, on his personal examination, or on the report of a sub-inspector, shall be of opinion that any schoolmaster who grants certificates of the school attendance of children employed in a factory is unfit to instruct children, by reason of his incapacity to teach them to read and write, from his gross ignorance, or from his not having the books and materials necessary to teach them reading and writing, or because of his immoral conduct, or of his continual neglect to fill up and sign the certificates of school attendance required by this act, the inspector of the district may annul any certificate granted by such disqualified schoolmaster, by a notice in writing addressed to the occupier of the factory in which the children named in the certificate are employed, or his principal agent, setting forth the grounds on which he deems such schoolmaster to be unfit; and after the date of such notice no certificate of school attendance granted by such schoolmaster shall be valid for the purposes of this act, unless with the consent in writing of the inspector of the district;

and to pay school fees.

Inspector may, by notice, annul the certificate of any schoolmaster found unfit.

but no inspector shall annul any such certificate unless in the aforesaid notice he shall name some other school situated within two miles of the factory where the children named in the certificate are employed: provided also, that any schoolmaster whose certificate shall have been annulled, or the occupier of the factory in which the children named in the said certificate are employed on behalf of the schoolmaster, may appeal to the Secretary of State against such decisions of the inspector, and the Secretary of State may, if he thinks fit, rescind such decision: provided also, that every inspector shall in his annual report to the Secretary of State for the Home Department state the instances (if any) in which he shall have had occasion to annul any such certificate, together with the reasons which he has in each case assigned for so doing. Appeal.

40. And be it enacted, that so much of the Factory Act as limits the time for preferring complaints for offences against the said act, and as requires any written notice to be given of the intention to prefer any complaint for such offence, and as fixes any penalty or punishment for offences against the said act, and as relates to the procedure for convicting any person of any offence against the said act, and for levying or inflicting the penalty or punishment imposed, and for appealing against any such conviction, and as specifies the circumstances under which any penalties and punishments shall not be levied or inflicted, and as relates to the application of penalties, shall be repealed. Repeal of part of 3 & 4 Will. 4, c. 103.

41. And be it enacted, that the occupier of any factory in which any offence against this act has been proved to have been committed, and for which a pecuniary penalty may be imposed, shall in every case (save as hereinafter provided) be deemed in the first instance to have committed the offence, and shall be liable to pay the penalty; but any occupier who shall have been proceeded against by any inspector or sub-inspector shall be entitled, upon complaint or information duly made by such occupier, to have any agent, servant or workman whom he shall charge as the actual offender brought by summons before the justices at the time appointed for hearing the complaint made against him by the inspector or sub-inspector; and if after the commission of the offence has been proved the occupier of the factory shall prove, to the satisfaction of the justices, that he had used due diligence to enforce the execution of the act, and that the said agent, servant or workman had committed the offence in question without his knowledge, consent or connivance, the said agent servant or workman shall be convicted of such offence, and shall pay the penalty instead of the occupier of the factory; and the payment of such penalty and costs shall be enforced against the agent, servant or workman in like manner as penalties are made recoverable by this act: provided always, that when it shall be made to appear to the satisfaction of the inspector or sub-inspector, at the time of discovering the offence, that the occupier of the factory had used all due diligence to enforce the execution of this act, and also by what person such offence had been committed, and also that it had been committed without the personal consent, connivance or knowledge of the occupier, and in contravention of his orders, then the inspector or sub-inspector shall proceed against the person whom he shall believe to be the actual offender in the first instance, without first proceeding against the occupier of the factory. Occupier of the factory to be liable for offences against this act in the first instance.

42. And be it enacted, that notice in writing of an intention to prefer a complaint that a child or young person had been employed in a factory in which sufficient means had not been employed or continued for protecting the workers from being wetted or for preventing the Notice of complaints of unguarded machinery.

escape of steam into the room occupied by the workers, or that any part of the aforesaid machinery (*g*), hoist or teagle or wheel-race has not been securely fenced, shall be given four days at least previous to the day fixed for hearing the complaint; and if the party complained against intend to bring forward any millwright or other person skilled in the construction of the aforesaid machinery as a witness at the hearing of the case, he shall give notice in writing of such intention to the inspector or sub-inspector who shall be the complainant forty-eight hours previous to the day fixed for hearing the case.

Inspector or sub-inspector to give notice of dangerous machinery.

43. And be it enacted, that if an inspector or sub-inspector shall observe in a factory any part of the machinery (*h*) of any kind or description or any driving strap or band not securely fenced, which he shall deem likely to cause bodily injury to any person employed in such factory, he shall give notice in writing to the occupier of such factory or his agent of such part of the machinery or such strap or band as he shall deem to be dangerous, according to the form and directions given in Schedule (D.) to this act annexed; and the occupier of the factory or his agent shall sign a duplicate copy of such notice in acknowledgment of his having received it: provided always, that upon an application in writing made by the occupier of the factory, within fourteen days after he shall have received such notice, two arbitrators skilled in the construction of the kind of machinery to which such notice refers shall be appointed, one of whom shall be named by the occupier of the factory in the aforesaid application, and the other by the inspector of the district, with the least possible delay after he shall have received such application; and the said arbitrators shall proceed to examine the machinery alleged to be dangerous within fourteen days of the appointment of the arbitrator named by the inspector; and if the arbitrators so appointed shall not agree in opinion the said arbitrators shall choose a third arbitrator possessing a similar knowledge of machinery; and if the said arbitrators or any two of them shall sign an opinion in writing addressed to the inspector of the district, that it is unnecessary or impossible to fence the machinery or strap or band alleged in the notice to be dangerous, the inspector of the district on receipt of the same shall cancel the said notice; and if the decision of the arbitrators shall be that it is unnecessary or impossible to fence the machinery so alleged to be dangerous, the expense of such reference shall be paid as other expenses under this act, but if the decision of the arbitrators shall be that it is necessary and possible to fence the said machinery, then the expenses of the reference shall be paid by the occupier of the factory, and shall be recoverable as the penalties under this act are recoverable.

Upon application by the occupier arbitrators may be appointed to examine the machinery.

Complaints to be preferred within two months.

44. And be it enacted, that all complaints for offences against this act shall be preferred within two months next after the commission of the offence, except in the case of complaints for offences punishable at discretion by fine or imprisonment, or for working on Christmas Day, Good Friday or the Sacramental Fast Days, or for not giving all or any of the eight half days for holidays required to be given, in each of which cases the complaints may be preferred within three months next after the commission of the offence; and no person shall be liable to a larger amount of penalties for any repetition from day to day of the same kind of offence than the highest penalty here-

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(*g*) See 19 & 20 Vict. c. 38, s. 5, *post*.

(*h*) See also 19 & 20 Vict. c. 38, ss. 5, 6, *post*.

inafter named for such offence, unless such repetition of offence shall have been committed after a complaint shall have been made for the previous offence, and except also for offences of employing two or more children or young persons contrary to law.

Proceedings under this act may be had before any justices.

45. And be it enacted, that all complaints for the enforcement of any penalty under this act shall be heard and determined by two or more justices of the peace acting for the county or other jurisdiction wherein the offence was committed, or for any adjoining county or jurisdiction, with the like authority as though the cause of complaint had arisen within such adjoining county or jurisdiction, provided that the place of hearing the complaint in such other county or jurisdiction be not more than five miles from the place where the offence was committed; and the justices by whom any person shall be fined for any offence against this act may order that such person shall pay the penalty, and also the reasonable costs and charges of such proceedings and conviction, either immediately or within such time as the said justices shall think fit; and in default of payment thereof any justice may cause the same to be levied by distress and sale of the goods and chattels of the party convicted, together with the reasonable costs and charges of such conviction, distress and sale, by warrant under the hand and seal of any such justice: and where the warrant of distress is directed against the goods and chattels of any person being the occupier of a factory it shall be lawful under such warrant to distrain any goods and chattels found in the said factory which would be liable to be distrained for rent in arrear.

Penalties may be recovered as in 5 Geo. 4, c. 18.

Power of distraining goods in factory where occupier is convicted.

Issue of summons for offences against act.

46. And be it enacted, that in England and Ireland a summons for an offence against this act shall be issued by any justice, upon complaint being made to him in writing by an inspector or sub-inspector, or upon oath before him by any other person, that to the best of the knowledge and belief of the inspector, sub-inspector or such other person such an offence has been committed, and in Scotland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or by the procurator fiscal, or by any person having a title and interest to prosecute with the concurrence of the procurator fiscal, that to the best of the knowledge and belief of such inspector, sub-inspector, procurator fiscal or other person such an offence has been committed; and in every such prosecution in Scotland the proceedings shall be summary, and it shall not be necessary to take down in writing more than the substance of the evidence; and no higher or other fees shall be allowed in Scotland to the clerk of court or constables than are allowed to be paid to the sheriff clerk and sheriff officers in causes and prosecutions under the authority of an act passed in the tenth year of the reign of King George the Fourth, intituled "An Act for the more effectual Recovery of Small Debts, and for diminishing the Expenses of Litigation in Causes of small Amount in the Sheriff Courts in Scotland."

10 Geo. 4, c. 55.

Compelling parties to

47. And be it enacted, that every person who shall be summoned to answer any complaint shall be bound to appear at the time (*i*)

(*i*) Where the proceedings are taken under sect. 47, the *time* is in the discretion of the justices; but *semble*, that, under sect. 50, the summons must be served twenty-four hours before the time at which the party is to appear; *Ex parte Hopwood*, 15 Q. B. 121. See further, *infra*, note to sect. 69. In *Ex parte Williams*, 2 L. M. & P. 580, it was held that under 11 & 12 Vict. c. 43, s. 2, which authorizes justices to proceed *ex parte* where

appear and bring register.

and place mentioned in the summons, and to produce before the justices then and there present every register or other account, paper or notice required by law to be kept by him or his agent which shall be mentioned in the summons; and if he shall not appear accordingly (*j*) then (upon proof of due service of the summons) the justices may either hear and determine the case in his absence, or issue their warrant, as hereinafter provided, for enforcing his attendance, and the attendance of any witness who shall refuse or neglect to appear.

Inspectors and sub-inspectors competent witnesses.

48. And be it declared and enacted, that it shall be no objection to the competency of any inspector or sub-inspector to give evidence as a witness in any prosecution under this act that it is brought at the instance of such inspector or sub-inspector.

Justices may enforce attendance of witnesses.

49. And be it enacted, that any justice of the peace, upon any complaint under this act, may summon any witness to appear and give evidence at a time and place appointed for hearing such complaint, and by warrant under his hand and seal may require any person to be brought before the justices by whom the complaint shall be heard who shall neglect or refuse to appear at the time and place appointed in any summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and may commit any person coming or brought before such justices who shall refuse to give evidence to the county prison or prison of the place where such offence was committed, there to remain for any time not exceeding one month, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any justice shall be a sufficient warrant to any gaoler or prison keeper for the discharge of such person.

Inspectors and sub-inspectors may summon offenders and witnesses.

50. And be it enacted, that every inspector and sub-inspector shall be empowered to summon (*k*) any person whom he shall charge with having offended against this act, and also all witnesses who may be needed to give evidence concerning the charge; and every such summons shall be of the same effect as if issued by a justice of the peace after complaint upon oath before him, and shall be enforced in like manner, and the like proceedings may be had thereupon, as if complaint upon oath had been made before such justice for such offence; and every constable and other peace officer to whom any such summons shall be directed shall be bound to take charge of and to serve such summons, and in default thereof shall be liable to be punished as if the summons had been issued by a justice of the peace; and every such summons of an offender or witness may be in the form provided in each case, and given in the Schedule (D.) hereunto annexed; and when an inspector or sub-inspector shall summon an offender he shall give to the same constable or peace officer a statement of the offence alleged to have been committed, who shall deliver it to a justice of the peace usually acting for the division in which the case is to be heard, or to the clerk of any such justice, at least twenty-four hours before the

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it is proved on oath before them that the summons has been served upon the defendant "a reasonable time" before the hearing, it was for *the justices* to decide whether the time was reasonable under the circumstances, and that having so decided the court would not review their decision.

(*j*) See *Ex parte Hopwood, ubi supra*, where defendant appeared by attorney only authorized to request an adjournment.

(*k*) See note (*i*) *ante*, p. 473.

period named in the summons for the appearance of the party charged with such offence.

In case of partnership, one name sufficient for summons.

51. And be it enacted, that it shall be sufficient, in any information, complaint or other proceeding under this act, to set forth the name of the ostensible occupier or title of the firm by which the occupier employing the workpeople of the factory may be usually known; and the service of any summons, order or notice required by this act, or issued under the authority of this act, and not expressly directed to be personal service, may be made by leaving the same at the dwelling-house of the person to whom the same shall be addressed, or, in the case of summoning or giving an order or notice to the occupier of a factory or to a schoolmaster, by giving a copy thereof in writing to the agent of such occupier, or by sending a copy thereof by the post directed to the occupier of the factory at the factory, or to the schoolmaster at his school.

Evidence of employment.

52. And be it enacted, that in any complaint of the employment of any person in a factory otherwise than is allowed by this act the time of beginning work in the morning which shall be stated in any notice fixed up in the factory, signed by the occupier or his agent, shall be taken to be the time when all persons in the factory, except children beginning to work in the afternoon, began to work on any day subsequent to the date of such notice, so long as the same continued fixed up in the factory; and if any person shall be allowed to enter or be in any factory, except at meal times, or during the stoppage of the whole machinery of the factory, or for the sole purpose of bringing tea or other articles of food to the workers in a factory, between the hours of four and five of the clock in the afternoon, it shall be evidence, unless the contrary shall be proved, that such person was then employed in that factory; but yards, playgrounds and places open to the public view, schoolrooms, waiting rooms, and other rooms belonging to the factory, in which no machinery is used or manufacturing process carried on, shall not be taken to be any part of the factory, with reference to this enactment (*l*).

Surgical certificates to be proof of age.

53. And be it enacted, that every surgical certificate given under this act, or which has been granted conformably to the Factory Act, and which shall not have been annulled, shall be evidence in the first instance of the age of the person named therein, but shall not protect any person, knowing such person to be of less than the age certified, from any penalty for employing or conniving at the employment of such person otherwise than is allowed by this act; and in every proceeding on any information or complaint for employing any person contrary to this act a declaration in writing by the certifying surgeon of the district that he has personally examined such person, and believes him to be under such age as shall be set forth in such declaration, shall be evidence, in the first instance, until the contrary shall be made to appear, that such person is under the age mentioned in such declaration.

Proof of age of persons alleged to be sixteen.

54. And be it enacted, that if any inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any person who is employed in a factory without a surgical certificate is less than sixteen, the occupier of the factory in which such person is employed shall be liable to the penalties for employing persons for whom a surgical certificate is required by law without the proper surgical certificate, unless, upon the proceeding for the enforcement of such penalties, he shall prove, by an extract from a

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(*l*) See further, 13 & 14 Vict. c. 54, *post.*

legal register of birth or baptism, that the said person had completed his sixteenth year of age.

Proof of age of persons alleged to be eighteen.

55. And be it enacted, that if an inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any person employed in a factory in a manner contrary to law is less than eighteen, the occupier of the factory in which such person is employed shall, save in the cases hereinafter excepted, be liable to the penalty for employing such person, unless upon the proceeding for the enforcement of such penalties he shall prove that the said person had completed his eighteenth year.

Penalties for employing children and young persons longer than allowed by the act.

56. And be it enacted, that any person who shall be convicted of having employed any person in any manner contrary to the provisions of the Factory Act as amended by this act, or for employing a child without having obtained a certificate from a schoolmaster where such certificate is required by law, such person not being the parent nor having any direct benefit from the wages of such child, shall for every such offence be adjudged to pay a penalty of not less than twenty shillings and not more than three pounds for each child or young person so illegally employed: provided always, that if it shall be proved that such offence was committed during the night the penalty shall not be less than forty shillings nor more than five pounds.

Penalty on parents for allowing children to be employed contrary to this act, or neglecting to cause them to attend school.

57. And be it enacted, that the parent and every person having any direct benefit from the wages of any child or young person employed in any manner forbidden by the Factory Act as amended by this act, or who shall neglect to cause such child to attend school as hereinbefore provided, shall be liable to a penalty of not less than five shillings and not more than twenty shillings for each offence, unless it shall appear to the justices before whom the complaint is preferred that such offence has been committed without the consent, connivance or wilful default of such parent or person so benefited.

Penalty for not limewashing or otherwise washing the interior of the factory.

58. And be it enacted, that the penalty for not limewashing the walls, passages, staircases and ceilings or tops of rooms of a factory, within the period prescribed by this act, or for not washing, as hereinbefore provided, the inside walls and ceilings or tops of rooms which are painted with oil, shall not be less than three nor more than ten pounds, and not less than two pounds additional penalty for every month during which the occupier shall allow any of the said walls, passages, staircases or ceilings or tops of rooms to remain without being limewashed or washed as aforesaid, after being convicted of this offence.

Penalty for not fencing machinery.

59. And be it enacted, that the penalty for not fencing the several parts of the machinery, hoist or teagle, and wheel-race, required by this act to be fenced, shall be not less than five pounds and not more than twenty pounds (*m*).

Penalty for not fencing dangerous machinery, after notice.

60. And be it enacted, that if any person shall suffer any bodily injury in consequence of the occupier of a factory having neglected to fence any part of the machinery, or any hoist or teagle, or any wheel-race required by this act to be securely fenced, or having neglected to fence any part of the machinery, or any driving strap or band in the factory, of which he shall have received notice in writing from an inspector or sub-inspector as hereinbefore provided, that the same was deemed to be dangerous, the occupier of such factory shall pay a penalty not less than ten pounds and not more than one

(*m*) As to this and the following section, see 19 & 20 Vict. c. 38, *post.*

hundred pounds; and the whole or any part of such penalty may be applied for the benefit of the injured person, or otherwise as the Secretary of State shall determine (*n*); and so much of such penalty as shall not be applied as aforesaid shall be applied as other penalties under this act: provided always, that the occupier of the factory shall not be liable to any such penalty if the notice which he shall have received from an inspector or sub-inspector shall have been cancelled as hereinbefore provided, or that in any proceeding against an occupier of a factory for not securely fencing that part of the machinery, hoist, teagle or wheel-race, by which such bodily injury was inflicted, the complaint shall have been heard and dismissed previous to the time when such bodily injury was inflicted.

Penalty for obstructing inspectors or sub-inspectors.

61. And be it enacted, that every person convicted of wilfully obstructing an inspector or sub-inspector in the execution of any of the powers intrusted to him by the Factory Act as amended by this act, shall be liable for each offence to a penalty not less than three pounds and not more than ten pounds.

Penalty for obstructing inspectors or sub-inspectors in the night.

62. And be it enacted, that every occupier of a factory in which an inspector or sub-inspector shall be obstructed in the night by any attempt to prevent his making a full and complete examination of all parts of the factory, and of every person employed therein, shall be liable to a penalty not less than twenty pounds and not more than fifty pounds.

Offences which shall be punishable by fine or imprisonment.

63. And be it enacted, that every person convicted of making, giving, signing, countersigning, counterfeiting or making use of any certificate authorized or required by the Factory Act or by this act, knowing the same to be untrue, or of wilfully making or wilfully conniving at the making any false or counterfeited certificate, or any false entry in any register, or any other account, paper or notice required by this act, and also every person convicted of wilfully making and signing a false declaration on any proceedings under this act, shall be liable to a penalty not less than five pounds and not more than twenty pounds, or to be imprisoned for any time not more than six months in the house of correction in the county, town or place where the offence was committed.

Penalty for offences not otherwise specified.

64. And be it enacted, that the penalty for any offence against the Factory Act as amended by this act, for which no specific penalty is hereinbefore provided, shall be any sum not less than two pounds and not more than five pounds.

Penalty in case of second and subsequent convictions.

65. And be it enacted, that every person who shall be convicted twice within twelve months for an offence of the same kind against the Factory Act as amended by this act, shall pay for his second offence any sum not less than one-half of the highest penalty for that offence, and if convicted three times within twelve months for an offence of the same kind he shall pay not less than two-thirds of the highest penalty, and if convicted more than three times within twenty-four months for an offence of the same kind he shall pay the highest penalty; but a repetition of the same kind of offence shall not be considered as the second or subsequent offences referred to in this enactment, unless such second or subsequent offences shall have been committed after a complaint has been made for the previous offences; and in any case in which a person shall be convicted at any one time for offences against the Factory Act as amended by this act, so that the penalties amount in the whole to more than one hundred pounds, the sum of one hundred pounds, together with all the reasonable costs and charges of such proceedings and convictions,

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(*n*) This does not take away the right of action by the injured person, *Caswell* v. *Worth*, 5 E. & B. 849.

may be paid instead of the penalties for all the offences committed by him before the day on which the last summons was taken out against him.

Application of penalties.

66. And be it enacted, that all penalties for any offence against the Factory Act which shall not have been otherwise appropriated at the time when this act shall come into force, and every penalty imposed under this act, shall be applied under the direction of one of her Majesty's principal Secretaries of State, and shall be paid on account of the inspector for the district in which the penalty was imposed to such banker as shall be appointed by such inspector to receive the same; and every person to whom any such penalty shall be paid shall pay over the amount thereof to the banker so appointed within fourteen days of receiving the same; and it shall be lawful for the Secretary of State to remit the whole or any part of such penalty; and so much thereof as shall not be so remitted, and not otherwise especially appropriated by this act, shall be applied by such inspector, under the direction of one of her Majesty's principal Secretaries of State, in such manner as shall appear best for the establishment or support of day schools for the education of children employed in factories; and so much of an act passed in the sixth year of the reign of his late Majesty, intituled "An Act to provide for the Regulation of Corporations in England and Wales," as provides that certain penalties and forfeitures, if recovered before any justice of any borough having a separate court of quarter sessions of the peace, shall be recovered for and adjudged to be paid to the treasurer of such borough, shall be repealed as to the penalties imposed under this act.

5 & 6 Will. 4, c. 76.

How former conviction may be proved.

67. And be it enacted, that whenever any person shall be convicted of any offence against the Factory Act as amended by this act, the clerk of the peace where such conviction shall have been filed shall, upon the request in writing of any inspector or sub-inspector deliver or cause to be delivered to him a copy of the conviction, certified under his hand to be a true copy; and every such copy shall be received as evidence of such conviction upon any future proceeding under this act; and for every such copy the clerk shall be entitled to have a fee of one shilling, and no more.

Convictions to be filed amongst the records of the county.

68. And be it enacted, that every conviction under this act may be in the form given in the Schedule (D.) to this act annexed, or in any other form more suitable to the case, and shall be certified in England and Ireland to the next general or quarter sessions of the peace, and in Scotland to the clerk of the justices of the peace, there to be filed amongst the records of the county, riding, division, stewartry, town or place.

No appeal from convictions, except in certain cases.

69. And be it enacted, that no appeal shall be allowed against any conviction under this act, except for an offence punishable at discretion by fine or imprisonment, or when the penalty awarded shall be more than three pounds; neither shall any conviction, except as aforesaid, be removable by *certiorari* (*o*) or bill of advocation into any court whatever: and no information, conviction or other pro-

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(*o*) A conviction cannot be removed by *certiorari*, merely on a suggestion that the party was convicted on summons of justices under sect. 47, giving unreasonably short notice, and in the absence of himself or any one appearing on his behalf, except an attorney authorized only to apply for an adjournment, and that the conviction took place without proof of service of summons, and without any evidence of the facts charged; such objections not going to the jurisdiction, *Ex parte Hopwood*, 15 Q. B. 121.

ceeding on any complaint for an offence against this act shall be quashed or deemed illegal for matter of form, or for the want of any averment unnecessary to be proved, or the omission of any word, or for the insertion of any word, in any case in which such omission or such insertion respectively do not affect the essence of the offence, nor for the wrong designation of a name or time or place where the person, time and place intended shall have been so stated as to have been, in the opinion of the justices by whom the complaint shall have been heard, clearly understood by the person charged with such offence; and it shall not be necessary, in any information, conviction or other proceeding under this act, to define the processes carried on in such factory, or nature of the power by which the machinery of such factory is moved, or to set out that the factory or process of employment referred to is not within any of the cases excepted, provided that it be therein stated that such factory is a factory within this act; and the proof of being within any such excepted case shall lie upon the party claiming the benefit of such exception.

Appeal.

70. And be it enacted, that any person aggrieved by any such conviction for which an appeal is allowed by this act may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of the conviction for the county or other jurisdiction wherein the cause of complaint shall have arisen; provided that the person so intending to appeal shall give to the inspector or sub-inspector of the district notice in writing of such appeal, and of the cause or matter thereof, within three days after the conviction or order, and seven clear days at least before such session, and shall also enter into a recognizance, with two sufficient sureties, before a justice of the peace for the county or other jurisdiction, seven clear days at the least before such session, conditioned personally to appear at the said session, and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be by the court awarded; and the court at such session shall hear and determine the matter of appeal, and shall make such order thereon as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction or order the court shall adjudge and order the party to be punished according to the conviction or to obey the order appealed against, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Who are to exercise the powers of justices.

71. And be it enacted, that in all cases in which a justice of the peace is required or empowered to do any thing under the Factory Act as amended by this act, or is named therein, a burgh magistrate shall have within his jurisdiction the same powers and duties as are herein given to such justice, and shall exercise the same in Scotland; but no complaint preferred for any offence against this act committed in a factory shall be heard by a justice of the peace or burgh magistrate, being an occupier of the factory, or being the father, son or brother of the occupier of the factory in which the offence set forth in the complaint shall have been committed.

Exemptions of silk factories.

72. Provided always, and be it enacted, that any child above eleven years of age employed solely in the winding and throwing of raw silk, and who shall have obtained the surgical certificate required by this act of his having completed his eleventh year, may work, without any proof of having attended a school, for any time not exceeding ten hours on any working day, but not after half-past four of the clock of the afternoon of any Saturday (*p*).

(*p*) Repealed 13 & 14 Vict. c. 54, s. 7, *post*.

Interpretation clause.

73. And be it enacted, that the Factory Act as amended by this act, and this act, shall be construed together as one act, and that so much of the Factory Act, and of any rule or regulation heretofore made by any inspector, as is inconsistent with this act, shall be taken to be repealed; and that in this act, unless another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the word "child" shall be taken to mean a child under the age of thirteen years; and the words "young person" shall be taken to mean a person of the age of thirteen years, and under the age of eighteen years; and the word "parent" shall be taken to mean parent, guardian or person having the legal custody of any such child or young person; and any person who shall work in any factory, whether for wages or not, or as a learner or otherwise, either in any manufacturing process, or in any labour incident to any manufacturing process, or in cleaning any part of the factory, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed, notwithstanding any other description, limitation or exception of employment in the Factory Act, to be employed therein within the meaning of this act; and the words "inspector" and "sub-inspector" shall be taken to mean respectively an inspector and a sub-inspector of factories; and the word "agent" shall be taken to mean any person having on behalf of the occupier of any factory the care or direction thereof or of any part thereof, or of any person employed therein; and the word "month" shall be taken to mean a calendar month; and the words "mill-gearing" shall be taken to comprehend every shaft, whether upright, oblique, or horizontal, and every wheel, drum or pulley by which the motion of the first moving power is communicated to any machine appertaining to the manufacturing processes; and the word "factory," notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland wherein or within the close or curtilage of which steam, water or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute or tow (*q*), either separately or mixed together, or mixed with any other material or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this act; but this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory or part of a factory used solely for the manufacture of lace, of hats, or of paper, or solely for bleaching, dyeing, printing or calendering; and the enactments of this act respecting the hours of labour shall not apply to any young person when employed solely in packing goods in any warehouse or part of a factory not used for any manufacturing process, or for any labour incident to any manufacturing process; and nothing in this act contained shall extend to any young person, being a mechanic, artisan or labourer, working only in making and repairing the machinery or any part of the factory.

"Child."

"Young person."

"Parent."

Employment.

"Inspector."

"Agent."

"Month."

"Mill-gearing."

"Factory."

Exception to the term factory.

Exemption when packing finished goods.

Exception in favour of mechanics.

(*q*) See 9 & 10 Vict. c. 40, *ante*, p. 458, note (*t*).

74. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament. Act may be amended this session.

SCHEDULES to which this Act refers.

SCHEDULE (A.)

CERTIFICATES.

[*To be written or printed on white paper.*]

Factories Regulation Act, Victoria, c.

No. ——. CERTIFICATE of AGE for a CHILD to be employed in the Factory of situated at in .

I, of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] of and residing in has been personally examined by me this day of one thousand eight hundred and and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years; and that the said child is not incapacitated, by disease or bodily infirmity, from working daily in the above-named factory for the time allowed by this act.

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a child who has obtained a certificate of real age shall be the same as above, omitting the words, "and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years," and substituting these words in their place: "and that a certificate of the birth [*or* baptism] of the said child has been produced to me in the form required by this act, proving that the real age of such child is at least eight years."

The form of surgical certificate to be given to children employed in silk mills in proof that a child is eleven years of age shall be the same as the above, substituting the word "eleven" for the word "eight."

[*To be written or printed on coloured paper.*]

Factories Regulation Act, Victoria, c.

No. ——. CERTIFICATE of AGE for a YOUNG PERSON to be employed in the Factory of situated at in .

I, of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter of] and residing in has been personally examined by me this day of one thousand eight hundred and and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the

real age of the said young person to be at least thirteen years: and that the said young person is not incapacitated, by disease or bodily infirmity, from working daily in the above-named factory for the time allowed by this act.

(Signed) Certifying Surgeon.

The form of surgical certificate to be given to a young person who has obtained a certificate of real age shall be the same as above, omitting the words "and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years," and substituting these words in their place, "and that a certificate of the birth [*or* baptism] of the said young person has been produced to me in the form required by this act, proving that the real age of such young person is at least thirteen years."

The form of surgical certificate to be given in either case by any practitioner who is not a certifying surgeon must be the same as the corresponding form above given, omitting the words "duly appointed a certifying surgeon," and substituting the words "duly authorized by the university [*or* college, *or other public body having authority in that behalf*] of to practise surgery [*or* medicine]," and making the following addition, which must be signed by a justice of the peace or burgh magistrate:—

The child [*or* young person] named in the above-written certificate has been this day brought before me; and the appearance of the said child [*or* young person] agrees with the description therein given; and I believe the real age of the said child [*or* young person] to be at least [*here insert the word "eight" or "eleven" in the case of a child, or "thirteen" in the case of a young person,*] years; and I declare that I have no beneficial interest in and am not the occupier of any factory, and that I am not the father, son or brother of the occupier of any factory.

Dated this day of one thousand eight hundred and

(Signed) C. D., Justice,
[*or* Burgh Magistrate.]

In every surgical certificate of age the day of the month on which it shall be granted shall be written in words, and not in figures.

So soon as any certificates authorized by this act to be received as proof of the age of any persons shall be obtained by the occupier of a factory or his agent, they shall be fixed in a book, to be called "The Age Certificate Book," in the order of the dates at which they shall have been respectively received: and such certificates shall be numbered in the order in which they are so fixed in the book; but the certificates for children shall be kept in a separate and distinct place in the said book, or in a separate book, and shall be marked with a series of running numbers distinct from that of the certificates for young persons.

So soon as any certificate of age authorized by this act shall be obtained the number hereinbefore required to be set against each certificate shall be set against the name of the child or young person for whom such certificate has been granted, in the first column of the register of the persons employed required by this act to be kept in each factory. In any silk factory in which it shall be lawful to employ children above eleven years of age for ten hours a day no certificate shall be required in proof that such children have attained

the age of thirteen years, so long as such persons shall not work more than ten hours in any one day.

If a surgeon shall have refused to grant a certificate of age to any child or young person, the word "refused" shall be written in the column of the register where the numbers of the certificates are required to be inserted.

Factories Regulation Act, Victoria, c.

CERTIFICATE REFUSED.

I, of duly appointed a certifying surgeon, do hereby declare, that son [*or* daughter] of residing in has been personally examined by me this day of one thousand eight hundred and and that in my opinion the said child [*or* young person] has not the ordinary strength and appearance [of a child of at least eight years of age (*or* of a young person of at least thirteen years of age) or (*or* and) is incapacitated by disease and bodily infirmity from working daily in a factory for the time allowed by this act].

(Signed) Certifying Surgeon.

N.B.—The words within brackets shall be in the handwriting of the certifying surgeon, who shall insert the reason of his refusal, to be either on account of deficient age or of bodily infirmity, or both, as the case may be.

Factories Regulation Act, Victoria, c.

SCHOOL CERTIFICATE.

I hereby certify that the under-mentioned child [*or* children] employed in the factory of situated in has [*or* have] attended the school kept by me at for the number of hours and at the time on each day specified in the columns opposite to his [her *or* their] name [*or* names] during the week ending on Saturday the day of one thousand eight hundred and , and that the causes of absence stated are true, to the best of my belief.

Name of Child.	Monday. Time.		Tuesday. Time.		Wednesday. Time.		Thursday. Time.		Friday. Time.		Causes of absence.
	From	To	From	To	From	To	From	To	From	To	

(Signed) Schoolmaster [*or* Schoolmistress].

the day of 18 .

Under the column headed "Time" the periods of the day that each child attends school shall be stated, as thus, from nine to twelve, or from two to five, or any other time, as the case may be; and all the children employed in the same factory who attend school before one of the clock in the afternoon shall be entered together, distinct from those who attend school after one of the clock.

The time when each child attends school shall be stated in the column for each day, in the handwriting of the schoolmaster; and no certificate shall be valid unless the schoolmaster shall, in his own handwriting, subscribe to it his christian and surname in full.

In the case of any child who has been absent from school, the letter (A.) shall be inserted under the day or days of absence, and the cause of absence shall be inserted in the column headed "Causes of Absence," so far as the same can be ascertained; and when any day has been a holiday at the school, the word "holiday" shall be entered in the column of the day.

All school certificates, if given on loose sheets, shall, as soon as received, be fixed in a book, to be called "The School Certificate Book," in the order of their respective dates. Copies of the above forms may be bound together in a book for each factory.

SCHEDULE (B.)

Registers.

Form for the Register of Young Persons.

List of Young Persons employed in this Factory.

No. of Reference to Age Certificate Book as required in Schedule (A.)	NAMES.		Date of first day of being employed or re-employed.			When any person ceases to be employed, insert opposite the name the word *Left;* and when any person completes his eighteenth year of age, the word *Eighteen.*
	Surname.	Christian Name.	Month.	Day.	Year.	

This register shall contain the names of every young person employed in the factory, to be entered successively when engaged to work, whether for the first time, or, after having left, when re-engaged to work.

At the beginning of this register shall be inserted—

1. The name of the occupier or firm.

2. The name of the factory, the place, township, parish and county where it is situated, and the post office to which the occupier desires his letters to be directed.

3. The nature of the work carried on.

4. The nature of the moving power, the whole amount of horse power of the steam engine or water-wheel, and also the amount of horse power employed by the occupier or firm.

5. The clock by which the employment of the workers in the factory is regulated.

Every alteration in any of the above particulars shall be inserted immediately after the alteration shall have been made.

6. The holidays and half holidays which shall have been given in conformity with this act shall be recorded together in a distinct place in this register.

7. The dates when the whole of the factory, if done at one time and the several parts if done at different times, shall have been limewashed or painted in oil, and, when painted in oil, the dates of their having been washed as required by this act, and the names and residences of the persons by whom the factory was limewashed or painted in oil, shall be recorded in a distinct place in this register within six days after they have been so limewashed, painted or washed; and this declaration of the times of limewashing, painting and washing, shall be signed by the mill occupier or his principal agent.

8. The visits of the certifying surgeon to the factory shall be recorded in this register in the manner following:—

Date of Visit.	Number of Persons presented for Examination.	Number of Certificates granted.	Signature of Surgeon.
	*	†	

* If the surgeon shall be told that there is no child or young person in the factory to be examined at the time of his visit, he shall insert in this column the word "None."

† If none be granted, he shall insert the word "None."

Form for the Register of Children.

To be kept in those factories only where children under thirteen years of age are employed.

Names of the Children employed in this Factory before Twelve o'Clock at Noon, or the Morning Set.

No. of Reference to Age Certificate Book as required in Schedule (A.)	NAMES.		Date of first day of employment or re-employment.			When any child ceases to be employed, insert opposite its name the word *Left;* or if transferred to the afternoon set, the word *Changed;* or the words *Young Person*, when a child completes its thirteenth year.
	Surname.	Christian Name.	Month.	Day.	Year.	

Names of the Children employed in this Factory after One o'Clock in the Afternoon, or the Afternoon Set.

No. of Reference to Age Certificate Book as required in Schedule (A).	NAMES.		Date of first day of employment or re-employment.			When any Child ceases to be employed, insert opposite its name the word *Left;* or if transferred to the morning set, the word *Changed;* or the words *Young Person*, when a child completes its thirteenth year.
	Surname.	Christian Name.	Month.	Day.	Year.	

This register shall contain the names of every child under thirteen years of age employed in the factory, to be entered successively when engaged to work, whether for the first time, or, after having left, when re-engaged to work.

If any child be removed from the morning set to the afternoon set, or *vice versâ*, the name of such child must be entered as a new comer in the register for the set to which it is removed, and the number of its certificate of age must be placed against its name, but no new certificate shall be required for such child.

If the mill occupier desires to change the time of working of the two entire sets of children at stated periods (as for instance) to make a change every month, so that the children who worked in the morning one month shall work in the afternoon the next month, and *vice versâ* for the other children, alternately throughout the year, it will not be necessary to enter the names of the children anew, but the mill occupier or his agent shall only be required to make and sign the following declaration, in addition to the other details hereinbefore required:—

1. The children entered in this register as belonging to the morning set work in this factory before twelve o'clock, and not after one o'clock, on and after the first Monday of the months of—

   January, March, May, July, September and November; and after one o'clock, and not before twelve o'clock, on and after the first Monday of the months of—

   February, April, June, August, October, and December.
2. The children entered in this register as belonging to the afternoon set work in this factory after one o'clock, and not before twelve o'clock, on and after the first Monday of the months of—

   January, March, May, July, September and November; and before twelve o'clock, and not after one o'clock, on and after the first Monday of the months of—

   February, April, June, August, October and December.

Signature of

Occupier or Agent.

When a change in the time of working of the two entire sets of children is made at other stated periods allowed by this act, the necessary alterations shall be made in the above declaration, to the satisfaction of the inspector or sub-inspector of the district.

In any silk factory in which children above eleven years of age are employed more than seven hours in any one day, a register of the names of such children shall be kept in the above form, distinct from the register of the names of the children who are employed in morning and afternoon sets.

In all mills where more than twenty children or young persons are employed an alphabetical index shall be kept, according to the first letter of the surname, of the names of all the children and young persons employed in the factory, adding to each name the number of the last certificate under which the age of the child or young person is employed, or if more than sixteen years of age the letters XVI.

All the forms contained in this Schedule (B.) which shall apply to any particular factory may be bound together in one book, except the alphabetical index of reference hereinbefore referred to.

SCHEDULE (C.)

Notices to be fixed up in the Factory.

Form for the Notice to be fixed up of the Names and Addresses of the Inspector and Sub-Inspector, the certifying Surgeon, the Clock for regulating the Factory, and the Hours of Work of all Young Persons and Females employed in the Factory.

Name and address of the inspector of the district - - - }
Name and address of the sub-inspector of the district - }
Name and address of the surgeon who grants certificates of age for the factory - - - }
Clock by which the hours of work are regulated - - - }

The Hours of Work of all Young Persons and Females above Eighteen Years of Age employed in this Factory (*r*).

Days of Week.	Morning.		Forenoon.		Afternoon.		Evening.		Total hours.
	From	To	From	To	From	To	From	To	
*									

* In this space the days of the week to which the hours of work refer shall be entered.

} Signature of the occupier of the factory or his agent.

In every silk factory in which children above eleven years of age are employed more than seven hours in any one day, a separate notice in the above form shall be fixed up of the hours such children are employed.

(*r*) See 13 & 14 Vict. c. 54, s. 2, *post*.

Form for the Notice to be fixed up of the Times allowed for Meals.

The Times allowed for Meals in this Factory.

Days of the Week.	Breakfast.		Dinner.		Tea.	
	From	To	From	To	From	To
*						

* In this space the day to which the meal hours refer shall be entered.

Signature of the occupier of the factory or his agent.

These notices of the regular hours of work fixed up in a factory are not required to be altered when young persons are only employed at other hours for the recovery of lost time as authorized by this act, provided the notice required to be fixed up when recovering lost time be fixed up, and provided on such notice it is stated at what time of the day it is intended to recover the time so lost.

Form of the Notice to be fixed up when the Occupier of the Factory intends to recover all or any part of the Time which has been lost by the Stoppage of the Machinery in the Factory, as allowed by this Act.

Account of Time lost and recovered.

TIME LOST.						TIME RECOVERED.					
Date.	Cause of Loss.	Time of Day when lost.	Amount lost.		Explanatory Remarks.	Date.		Time of Day when recovered.	Amount recovered.		Explanatory Remarks.
			Hours.	Min.					Hours.	Min.	

Signature of the occupier of the factory or his agent.

No lost time is required to be entered except such as it may be intended to recover.

The entries of all the details in this notice relating to any time lost or recovered shall be made in conformity with the provisions in the act.

Form of the Notice to be fixed up when Time has been lost by partial Stoppage of the Machinery by Drought or Floods, and is intended to be recovered during the following Night.

Notice of Time lost and recovered.

TIME LOST.					TIME RECOVERED.		
Description of the room where the stoppage took place, and of the machinery stopped.	Time of the day when the stoppage took place.	Amount of Time lost.		Signature of the person taking Time.	Time of the night when the young persons are employed.	Amount of Time recovered.	
		Hours.	Min.			Hours.	Min.

Names of the Females and Young Persons who have lost Time by the Stoppage of the Machinery at the Dates affixed.

Date when Time was lost.	Surname.	Christian Name.	Date when Time was lost.	Surname.	Christian Name.

The entries of time lost, and of the names of the females and young persons who have lost time, shall be made in these notices before any part of the time can be recovered.

All notices of time lost and recovered, except when they are kept hung up in the factory, as required by this act, shall be preserved in a book in the order of their respective dates, and be open for the examination of any inspector or sub-inspector, and all such notices shall be kept for six calendar months after the lost time entered therein shall have been recovered.

SCHEDULE (D.)

Forms of Notices, Summonses and Conviction.

Form of Notice to be given to the Occupier of a Factory, by an Inspector or Sub-Inspector of such part of the Machinery, or such Driving Strap, or Band, in the Factory, as appears to him to be dangerous to the Workers.

To [*name of occupier*], occupier of a [*description of the manufacture*] factory, situated in the parish of and county of

I hereby give you notice, that the following parts of the machinery in your factory, namely [*here enumerate the parts*], appear to me to be dangerous, and likely to cause bodily injury to the workers employed in the factory; and I am of opinion that they ought severally to be immediately well and securely fenced. And I hereby further give you notice, that by the act made in the year of her Majesty's reign, intituled [*here set forth the title of this act*], it is provided, that if, after receiving this notice, you shall neglect or fail to fence the above enumerated machinery, and if any persons shall suffer any bodily injury in consequence of such neglect or failure, you will be liable to a penalty of one hundred pounds, over and above all damages, costs and charges to which you may be found liable in any action brought against you by or on behalf of the person so injured.

Given under my hand, this day of in the year one thousand eight hundred and

(Signed) Inspector [*or* Sub-Inspector].

Form of Summons to be issued by an Inspector or Sub-Inspector against a Person who has committed an Offence.

County of }
[*or* borough of] }

To the constable of

Whereas it appeareth to me I. F., one of her Majesty's inspectors [*or* sub-inspectors] of factories, that A. D. of in the county [*or* borough, *&c.*] of hath offended against the act made in the year of her Majesty's reign, intituled [*here set forth the title of this act*], forasmuch as he the said A. D., on the day of in the year of Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*]; these therefore are to require you forthwith to summon the said

A. D. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of who shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to answer to the said charge, and to be further dealt with according to law. And be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord

(Signed) I. F., Inspector [*or* Sub-Inspector].

Form of Summons of a Witness to be issued by an Inspector or Sub-Inspector.

County of }
[*or* borough of] }

To the constable of

Whereas it appeareth to me, I. F., one of her Majesty's inspectors [*or* sub-inspector] of factories, that A. D. of in the county [*or* borough, *&c.*] of hath offended against the act made in the year of her Majesty's reign, intituled [*here set forth the title of the act*]; forasmuch as he the said A. D. on the day of in the year of our Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*], and that B. P. of in the county [*or* borough, *&c.*] is a material witness to be examined concerning the said charge; these therefore are to require you forthwith to summon the said B. P. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of as shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to testify his knowledge concerning the premises. And be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord

(Signed) I. F., Inspector [*or* Sub-Inspector].

Form of Conviction.

County of } BE it remembered, that on the day
[liberty *or* borough, *as the case may be.*] } of in the year one thousand eight hundred and A. B. [*describe the offender*] is convicted before us, J. P. and K. Q., two of her Majesty's justices of the peace for the county [liberty *or* borough, *as the case may be*] of in pursuance of an act passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this act*], for that he [*describe the offence*].

Given under our hands and seals, the day and year above written.

J. P. (L. S.)
K. Q. (L. S.)

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8 & 9 VICT. C. 29.

An Act to regulate the Labour of Children, Young Persons and Women, in Print Works. [30th June, 1845.]

Whereas it is expedient to regulate the labour of children, young persons, and women in print works: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that this act shall take effect from and after the first day of January in the year one thousand eight hundred and forty-six, except any provisions for the taking effect of which any other time shall be hereinafter specially limited; all which last-mentioned provisions shall take effect from and after such time as shall be hereinafter specially mentioned in that behalf. Commencement of act.

2. And be it enacted, that in this act, unless another sense shall be plainly shown by the context, or by some positive enactment to the contrary, the words "print work" shall be taken to mean any building or shed, and any part thereof, within which any persons are employed to print figures, patterns or designs, by means of blocks or cylinders, or by means of any other tool, instrument or mechanism, upon any woven fabric of cotton, wool, hair, fur, silk, flax, hemp or jute, either separately or mixed together, or mixed with any other material; or upon any felted fabric of wool or fur, either separately or mixed with any other material; or upon any cotton, linen, woollen, worsted or silken yarn; and the words "incidental printing process" shall be taken to mean any process of preparing, dyeing, bleaching, cleaning, calendering, dressing or finishing incident or necessary to the completion of the chief process of printing figures, patterns or designs upon any of the aforesaid materials, and carried on within buildings, sheds, fields or portions of ground lying adjacent to each other, or forming a part or parts of the establishment where the chief process of printing as aforesaid is carried on; and the word "child" shall be taken to mean a child under the age of thirteen years; and the words "young person" shall be taken to mean a person of the age of thirteen years and under the age of sixteen years; and the word "parent" shall be taken to mean parent, guardian or person having the legal custody of any such child; and any word denoting the "masculine gender" and "singular number" shall be taken to include a female as well as a male, and any number of persons; and any person who shall work in any print work, whether for wages or not, or as a learner or otherwise, either in printing, or in any incidental printing process, or in cleaning any part of the print work, or in cleaning any block, cylinder, tool or machine used therein, or in any other kind of work whatsoever, save in the cases hereinafter excepted, shall be deemed to be employed therein within the meaning of this act; and the word "inspector" and "sub-inspector" shall be taken to mean respectively an inspector and sub-inspector of print works; and the word "agent" shall be taken to mean any person having on behalf of the occupier of any print work the care or direction thereof or of any part thereof, or of any person employed therein; and the word "month" shall be taken to mean a calendar month; and the word "day" shall be taken to mean from six of the clock in the morning until ten of the clock in the evening of the same day; and the word "night" shall be taken to mean from ten of the clock in the evening of any one day until six of the clock of the next following morning; and any part of such print work may Interpretation clause: "Print work:" "Incidental printing process:" "Child:" "Young person:" "Parent:" "Masculine gender," and "singular number:" "Employment:" "Inspector" and "sub-inspector:" "Agent:" "Month:" "Day:" "Night:" Exception

to the term "print work."

be taken to be a print work within the meaning of this act; but this enactment shall not extend to any part of such buildings used solely for the purposes of a dwelling-house; and nothing in this act contained shall extend to any person, being a mechanic, artisan or labourer, working only in making or repairing the machinery or any part of the print work.

Exception in favour of mechanics.

Inspectors and sub-inspectors.

3 & 4 Will. 4, c. 103.

7 & 8 Vict. c. 15.

3. And be it enacted, that the inspectors and sub-inspectors of factories appointed or to be appointed by virtue of an act passed in the fourth year of the reign of his late Majesty, intituled "An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom," and of another act passed in the seventh year of the reign of her Majesty, intituled "An Act to amend the Laws relating to Labour in Factories," shall respectively be inspectors and sub-inspectors for carrying into effect the powers, authorities and provisions of this act.

Power of inspectors and sub-inspectors.

4. And be it enacted, that every inspector and sub-inspector shall have power to enter every part of any print work at any time, by day or by night, when any person shall be employed therein, and to enter by day any place which he shall have reason to believe to be a print work, and to enter any school in which children employed in print works are educated, and at all times to take with him into any print work the certifying surgeons of the district hereinafter mentioned, and any constable or other peace officer whom he may need to assist him, and shall have power to examine, either alone or in the presence of any other person, as he shall think fit, every person whom he shall find in a print work or in such a school, or whom he shall have reason to believe to be or to have been employed in a print work within twelve months next preceding the time when he shall require him to be examined touching any matter within the provisions of this act; and the inspector or sub-inspector may, if he shall see fit, require such person to make and sign a declaration of the truth of the matters respecting which he shall have been or shall be so examined; and every inspector and sub-inspector shall have power to examine the registers, certificates, notices, and other documents kept in pursuance of this act; and every person who shall refuse to be examined as aforesaid, or who shall refuse to sign his name or affix his mark to a declaration of the truth of the matters respecting which he shall have been examined, or who shall in any manner attempt to conceal or otherwise prevent any child or other person from appearing before or being examined by an inspector, or sub-inspector, or who shall prevent or knowingly delay the admission of an inspector or sub-inspector to any part of a print work or school, or shall prevent an inspector or sub-inspector from examining any register, certificate, notice or other document kept in pursuance of this act, shall be deemed guilty of wilfully obstructing the inspector or sub-inspector in the execution of the powers intrusted to him.

Inspectors to report.

5. And be it enacted, that every inspector shall keep full minutes of all his visits and proceedings, and shall report the same to one of her Majesty's principal Secretaries of State twice in every year, and oftener if required, and shall report the state and condition of the print works, and of the persons employed therein whose labour is regulated by this act, and whether such print works are conducted according to the provisions of this act.

Owners of print works to send particulars connected

6. And be it enacted, that every person carrying on business at any print work shall, within one month next after the passing of this act, or within one month after beginning to carry on such business, send a written notice, addressed to the Office of the Factory

Inspectors, London, containing the name of such print work, together with the place, township or parish and county, where the same is situated, the post town to which he desires his letters to be addressed, the nature of the work, and the name of the firm under which such business is or is to be carried on. therewith to inspectors of factories.

7. And be it enacted, that the certifying surgeons appointed or to be appointed by virtue of the said act of the seventh year of the reign of her Majesty shall be certifying surgeons for carrying into effect the powers, authorities and provisions of this act. Appointment of certifying surgeons.

8. And be it enacted, that the certificates of age required by this act, herein called surgical certificates, shall be given according to the form and directions contained in the Schedule (A.) annexed to this act; and the name of every person for whom a surgical certificate is required by this act, and the date of the first day of employment or re-employment of such person, shall be registered in the form and according to the directions given in the Schedule (B.) annexed to this act, before it shall be lawful to employ such person in a print work. Form of surgical certificate.

9. And be it enacted, that no such surgical certificate given by any person who is not an appointed certifying surgeon shall be of any force unless it is given by a person duly authorized by an university or college, or other public body having authority in that behalf to practise surgery or medicine, and countersigned, according to the form and directions given in the Schedule (A.) to this act annexed, by some justice of the peace, not being the occupier of a print work, and not being the father, son or brother of the occupier of a print work; and no person shall countersign any such surgical certificate in the absence of the person named therein, or without proof that the person brought before him is the same to whom the certificate was granted. Certificates not given by certifying surgeon must be by persons duly authorized, and countersigned by a magistrate.

10. And be it enacted, that no person shall grant any surgical certificate required by this act, except upon personal inspection of the person named therein; and no certifying surgeon shall examine any person for the purposes of this act, or sign or issue any such surgical certificate, elsewhere than at the print work where such person is to be employed, unless for special cause, to be allowed by an inspector: and if a certifying surgeon shall refuse to grant a certificate of age to any person presented to him for such examination, he shall give, when required, instead of such certificate, a paper specifying under his hand the reasons for such refusal, in the form and directions given in the Schedule (A.) to this act annexed. Surgical certificates to be given at the print work.

11. And be it enacted, that if the occupier of a print work shall agree in writing with the certifying surgeon of a district for the payment to be made by the occupier of the print work to the certifying surgeon for the examination of persons for whom surgical certificates are required by this act, and if the terms of such agreement shall be in conformity with such regulations for the guidance of the surgeons as shall be made by the inspector of the district, and shall be countersigned by the inspector in token of such conformity, all penalties which may be incurred by any party for breach of such agreement may be recovered as other penalties under this act may be recovered, and shall be applied as other penalties under this act are directed to be applied, and no such agreement shall be liable to any stamp duty. Agreement between occupier of a print work and certifying surgeon.

12. And be it enacted, that an inspector shall fix the amount of fees to be paid by the occupier of a print work, and the times when such fee shall be paid to the certifying surgeon, and also the times when such certifying surgeon shall visit a print work, provided he Inspector may fix surgeon's fees.

shall be required to fix such fees and visits by the occupier of a print work; and the fees so to be fixed by the inspector shall not in any case where the surgeon shall examine more than one person exceed one shilling for each person who shall be presented to him at the print work by the occupier thereof or his agent to be examined, together with sixpence for every half mile that the distance of the print work from the residence of such surgeon shall exceed one mile, and such fees, including mileage, shall not be less than one shilling, and shall in no case exceed five shillings for any one visit, except when upon such visit the certifying surgeon shall examine for the said certificates of age more than ten persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other fees; and in any case where a print work is situated within the distance of one mile from the residence of a certifying surgeon the fee for such print work shall not exceed two shillings and sixpence for each visit, except when at any one visit he shall examine for the said certificates of age more than five persons who may be brought before him as aforesaid, in which case he shall receive sixpence for each person that he may so examine, instead of all other fees; and no certifying surgeon shall receive more than sixpence for any certificate which he may be allowed by an inspector, as hereinbefore provided, to sign or issue otherwise than at the print works where the person is to be employed; and the occupier of any print work shall pay such fees to the certifying surgeon at the time of signing such certificates, or at any other time when he may be directed by the inspector to do so; and the occupier of such print work may deduct the fee, or any part thereof, not exceeding in any one case the sum of threepence, from the wages of the person for whom the certificate may have been granted; but in any case where such agreement as aforesaid has been executed between an occupier of a print work and the certifying surgeon, the amount named in such agreement shall be instead of the fees fixed by any inspector in virtue of this act: provided always, that no certifying surgeon shall be required to visit any print work situated within three miles of his residence oftener than once in each week, or to visit any print work situated at a greater distance than three miles oftener than once in every fortnight, unless with the consent of the occupier of the print work.

Inspectors and sub-inspectors may annul certificates.

13. And be it enacted, that every inspector and sub-inspector may annul any surgical certificate granted by this act by writing across the surgical certificate the word "annulled," with his name, and the date of annulling such certificate; provided that in either case he shall have reason to believe the real age of the person mentioned therein to be less than that mentioned in the certificate, or provided the certifying surgeon of the district shall, upon reference made to him, deem such person to be then of deficient health or strength, or by disease or bodily infirmity incapacitated for labour, or liable to be injured by continued employment; and no certificate so annulled shall be valid in respect of the person named therein for the purposes of this act from the day when the certificate shall have been so annulled: and the production of the certificate shall be evidence that the certificate was annulled on the day so stated.

Certificates of real age may be obtained.

14. And be it enacted, that in case any person shall be desirous of proving the real age of any person for whom a certifying surgeon shall have refused to grant a certificate of age for the purposes of this act, or whose surgical certificate any inspector or sub-inspector shall have annulled, the inspector or sub-inspector shall, on demand, give to such person a requisition under his hand in a form to be approved

of by the inspectors and by the registrar general, for the production of a duly certified copy of the entry of the birth or baptism of such person, provided the party demanding the same shall declare the names of such person and of his parents, with the place where and the year in which he was born or baptized, which particulars shall be set forth in the requisition; and every party to whom such requisition shall have been given shall be entitled, upon payment of one shilling, to receive, on personal application or on application in writing in such form and under such regulations as shall be approved of by the inspectors and registrar general, from any minister, registrar or other person having the care of any register of births or baptisms in which the birth or baptism of such person is entered, a duly certified copy of the entry in such register, which shall be endorsed on the aforesaid requisition, and shall be signed by the minister, registrar or other person having charge of such register; and such payment of one shilling shall be instead of all other fees or payments to which such minister, registrar or other person shall be entitled; and if the said certified copy proving the age of the person named therein to be such as to entitle him to have the surgical certificate required shall be produced to the certifying surgeon of the district, he shall examine the same, and if it shall appear to him that the said certified copy has not been altered or falsified in any manner, the certifying surgeon shall thereupon, without further fee or reward, give a surgical certificate in the form provided for that case in Schedule (A.) to this act annexed, and shall write the word "examined" upon the certified copy of the entry of the birth or baptism which he shall have received, with his signature, and the date of such signature, and shall send such certified copy by the post to the sub-inspector of the district, who shall send a receipt for the same by post to the said surgeon, and shall keep such certified copy of the entry of the birth or baptism for future reference, if necessary; and if any inspector shall require a certified copy of the entry of the birth of any person employed in any print work from the office of the registrar general, he, or any person deputed by him shall, on producing a requisition in the form hereinbefore provided, be entitled to examine the indexes to the registers in the general register office, and to receive such certified copy indorsed on the requisition without the payment of any fee; but no certified copy of the entry of any birth or baptism issued in consequence of any such requisition hereinbefore provided shall be admissible in evidence in any court or for any purpose, save for the purposes of this act: provided always, that in those cases in which a surgical certificate shall have been refused or annulled in consequence of deficient health or strength, or by reason of disease or bodily infirmity, the inspector or sub-inspector shall not sign the requisition hereinbefore mentioned, and such person shall not be employed on proof of real age only.

Certificates to be obtained before the person is employed, and to serve only for one print work.

15. And be it enacted, that before employing any person requiring a surgical certificate under this act the occupier of the print work shall obtain the surgical certificate, save as hereinafter excepted, and shall keep and be bound to produce every such certificate when required to the inspector or sub-inspector; and no surgical certificate shall be valid, except for employment at the print work for which it was originally granted, or, if granted by a certifying surgeon, at any other print work in the occupation of the same person who is occupier of the print work for which the certificate was originally granted, provided such other print work be in the district of the certifying surgeon who granted the certificate, and the certificate be produced in the print work where the person named in the certificate is at

work; and the certifying surgeon, as often as he shall visit a print work for the purpose of granting certificates, shall enter in the register of children the date of his visit, and the other particulars set forth in the form and according to the directions given in Schedule (B.) to this act annexed.

Surgical certificates may be dispensed with for seven or thirteen days.

16. Provided always, and be it enacted, that no occupier of any print work shall be liable to any penalty for employing any person in any manner not contrary to the other provisions of this act, without a surgical certificate, for any time not exceeding seven working days, or, when the certifying surgeon shall reside more than three miles from the print work, for any time not exceeding thirteen working days, provided all surgical certificates for that print work be granted only by the certifying surgeon appointed for that print work; but this enactment shall not be construed to authorize the employment of any person in respect of whom the certifying surgeon shall have refused to grant such surgical certificate.

Surgical certificate to be proof of age.

17. And be it enacted, that every surgical certificate given under this act, and which shall not have been annulled, shall be evidence in the first instance of the age of the person named therein, but shall not protect any person, knowing such person to be of less than the age certified, from any penalty for employing or conniving at the employment of such person otherwise than is allowed by this act; and in every proceeding on any information or complaint for employing any person contrary to this act a declaration in writing, by the certifying surgeon of the district, that he has personally examined such person, and believes him to be under such age as shall be set forth in such declaration, shall be evidence in the first instance, until the contrary shall be made to appear, that such person is under the age mentioned in such declaration.

Proof of age of persons alleged to be sixteen.

18. And be it enacted, that if any inspector or sub-inspector shall make a complaint before a justice of the peace that the real age of any person who is employed in a print work without a surgical certificate is less than sixteen, the occupier of the print work in which such person is employed shall be liable to the penalties for employing persons for whom a surgeon's certificate is required by law without the proper surgical certificate, unless upon the proceeding for the enforcement of such penalties he shall prove, by an extract from a legal register of birth or baptism, that the said person had completed his sixteenth year of age.

Children under eight years not to be employed.

19. And be it enacted, that after the first day of January, one thousand eight hundred and forty-six, no child under the age of eight years shall be employed in any print work.

Surgical certificates for children.

20. And be it enacted, that no child shall be employed in a print work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgeon's certificate, according to the form and directions given in the Schedule (A.) to this act annexed, in proof that such child has the ordinary strength and appearance of a child of at least eight years of age, and is not incapacitated by disease or bodily infirmity from working daily in a print work, as allowed by this act.

Surgical certificates for young persons.

21. And be it enacted, that no young person shall be employed in a print work (save in the cases hereafter excepted) until the occupier thereof shall have obtained a surgical certificate according to the form and directions given in the Schedule (A.) to this act annexed, in proof that such young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and is not incapacitated by disease or bodily infirmity from working in a print work, as allowed by this act.

Children and females not to be employed in the night.

22. And be it enacted, that after the first day of January one thousand eight hundred and forty-six no child or female shall be employed in any print work during the night.

Children to attend school.

23. And be it enacted, that after the first day of July one thousand eight hundred and forty-six, the parent or person having any direct benefit from the wages of any child employed or intended to be employed in a print work shall cause such child to attend some school for at least thirty days, together or separately, exclusive of Sundays, during the half year between the first day of January and the thirtieth day of June, both days inclusive, and in like manner for thirty days during the half year between the first day of July and the thirty-first day of December, both days inclusive, in each year, during any part of which it shall be employed in a print work, such attendance being after the hour of eight of the clock in the morning and before the hour of six of the clock in the evening, and such attendance shall not be less than one hundred and fifty hours during each half year; but no attendance above five hours on any one day shall be reckoned as a part of the said one hundred and fifty hours (*s*).

Registry of school attendance.

24. And be it enacted, that so soon as a child shall be employed in a print work the parent or person having direct benefit from the wages of such child shall notify to the occupier of the print work the school which such child is to attend during the time it is employed in such print work, and the occupiers of the print work shall enter in the register of children hereinafter required to be kept the name of the schoolmaster and the situation of the school so notified to him; and the parent or person having direct benefit from the wages of such child shall provide a school certificate book, according to the form and directions given in the Schedule (A.) annexed to this act, and shall deliver the same to the master of the school which such child is to attend, and the said master shall enter therein, week by week, the attendance or absence of such child during that week, and shall produce such certificate book, while in his custody, to the inspector or sub-inspector of the district, when required; and the master of any school which shall be attended by children employed in a print work shall keep a register of their names and attendance, and if the inspector of the district shall disapprove of the form of register adopted by the schoolmaster, it shall be kept in such other form as the inspector shall direct (*t*).

Occupiers of print works to obtain certificates of children's school attendance.

25. And be it enacted, that after the first day of July, one thousand eight hundred and forty-six, the occupier of every print work shall, before employing any child therein, obtain from a schoolmaster a certificate, according to the form and directions given in the Schedule (A.) to this act annexed, that such child had attended school for at least *fifty* (*u*) days, as required by this act, during the half year ending on the thirtieth day of June or thirty-first day of December next before the beginning of such employment, and the like certificate at the beginning of each following period of six months during which the employment of such child shall be continued in that print work; and such occupier shall keep every such certificate so long as such child shall continue in his employment for twelve months after the date thereof, and shall produce the same to any inspector or sub-inspector, when required, during such period (*v*).

(*s*) Sects. 23, 24 and 25 are repealed by 10 & 11 Vict. c. 70, *post*.

(*t*) See note (*s*), *supra*.

(*u*) Amended to *thirty* by 9 & 10 Vict. c. 18, but now repealed, *supra*, note (*s*).

(*v*) See note (*s*), *supra*.

Inspector may by notice annul the certificate of any schoolmaster found unfit.

26. And be it enacted, that if an inspector, on his personal examination, or on the report of a sub-inspector, shall be of opinion that any schoolmaster who grants certificates of the school attendance of children employed in a print work is unfit to instruct children, by reason of his incapacity to teach them to read and write, from his gross ignorance, or from his not having the books and materials necessary to teach them reading and writing, or because of his immoral conduct, or of his continued neglect to keep the registers, and fill up and sign the certificate of school attendance, as required by this act, the inspector of the district may annul any certificate granted by such disqualified schoolmaster, by a notice in writing addressed to the occupier of the print work in which the children named in the certificate are employed, or his principal agent, setting forth the grounds on which he deems such schoolmaster to be unfit; and after the date of such notice no certificate of school attendance granted by such schoolmaster shall be valid for the purposes of this act, unless with the consent in writing of the inspector of the district; but no inspector shall annul any such certificate unless in the aforesaid notice he shall name some other school situated within two miles of the print work where the children named in the certificate are employed: provided always, that any schoolmaster whose certificate shall have been annulled, or the occupier of the print work in which the children named in the said certificate are employed on behalf of the schoolmaster, may appeal to the Secretary of State against any such decision of the inspector, and the Secretary of State may, if he think fit, rescind such decision: provided also, that every inspector shall in his annual report to the Secretary of State state the instances (if any) in which he shall have had occasion to annul any such certificate, together with the reasons which he has in each case assigned for so doing.

Appeal.

Registers to be kept in every print work.

27. And be it enacted, that registers shall be kept in the print work to which they relate by the occupier of every print work, according to the forms and directions given in Schedule (B.) to this act annexed; and every inspector shall have power to require such occupier to send to him, in such manner as may be directed in the requisition, any extracts from such registers, and any other information with relation to the persons employed in the print work which may be requisite to facilitate the performance of the duties of such inspector in any inquiry made under the authority of this act; but no information so sent by the occupier of any print work which is not contained in the registers, certificates and other documents required by this act to be received or kept shall be admissible in evidence in any proceeding against him for the recovery of any penalty; and the registers, certificates and other documents, required by this act to be received or kept shall be forthwith produced to the inspector or sub-inspector, on his demanding to examine the same, at any time when the print work is at work.

For ensuring regularity in the observance of time.

28. And be it enacted, that the hours of the day during which it is lawful to employ children, young persons and women, shall be regulated in every print work by a public clock, or by some other clock open to the public view, to be approved of in either case in writing under the hand of the inspector or sub-inspector of the district.

An abstract of this act, and certain notices, to be hung up in every print work.

29. And be it enacted, that such abstract of this act as shall be directed by one of her Majesty's principal Secretaries of State shall be fixed on a moveable board, and be hung up as soon as received by the occupier of the print work or his agent in the entrance of the print work, and in such other places as the inspector or sub-inspector

of the district may direct; and notices of the names and addresses of the inspector and sub-inspector of the district in which the print work is situated, of the clock by which the hours of work in the print work are regulated, and any alteration thereof, together with every other notice required by this act, written or printed in legible characters, and fixed on moveable boards (each particular notice being signed by the occupier of every print work or his agent), shall be hung up at the entrance of the print work, where they may be easily read by the persons employed in the print work, and in such other places as the inspector or sub-inspector of the district may direct, and whence they shall not be removed while the print work is at work; and in case any such abstract of this act or notice shall become illegible in any part, the occupier of the print work shall cause a new copy thereof to be provided and hung up as aforesaid; and every notice required to be hung up shall be in the forms and according to the directions given in the Schedule (C.) hereunto annexed.

Occupier of the print work to be liable for offences against this act in the first instance.

30. And be it enacted, that the occupier of any print work in which any offence against this act has been proved to have been committed, and for which a pecuniary penalty may be imposed, shall in every case (save as hereinafter provided) be deemed in the first instance to have committed the offence, and shall be liable to pay the penalty; but any occupier who shall have been proceeded against by any inspector or sub-inspector shall be entitled, upon complaint or information duly made by such occupier, to have any agent, servant or workman whom he shall charge as the actual offender brought by summons before the justices at the time appointed for hearing the complaint made against him by the inspector or sub-inspector; and if after the commission of the offence has been proved the occupier of the print work shall prove to the satisfaction of the justices that he had used due diligence to enforce the execution of the act, and that the said agent, servant or workman had committed the offence in question without his knowledge, consent or connivance, the said agent, servant or workman shall be convicted of such offence, and shall pay the penalty instead of the occupier of the print work; and the payment of such penalty and costs shall be enforced against the agent, servant or workman in like manner as penalties are made recoverable by this act: provided always, that when it shall be made to appear to the satisfaction of the inspector or sub-inspector, at the time of discovering the offence, that the occupier of the print work had used all due diligence to enforce the execution of this act, and also by what person such offence had been committed, and also that it had been committed without the personal consent, connivance or knowledge of the occupier, and in contravention of his orders, then the inspector or sub-inspector shall proceed against the person whom he shall believe to be the actual offender in the first instance, without first proceeding against the occupier of the print work.

When complaints to be preferred.

31. And be it enacted, that all complaints for offences against this act shall be preferred within two months next after the commission of the offence, except in the case of complaints for having employed a child without the school certificate required by this act, in which case the complaints may be preferred within six months next after the commission of the offence, or in the case of complaints for offences punishable at discretion by fine or imprisonment, in which case the complaints may be preferred within twelve months next after the commission of the offence; and no person shall be liable to a larger amount of penalties for any repetition from day to day of the same kind of offence than the highest penalty hereinafter named for such

offence, unless such repetition of offence shall have been committed after a complaint shall have been made for the previous offence, and except also for offences of employing two or more children or young persons or women contrary to law.

Proceedings under this act may be had before any justices.

32. And be it enacted, that all complaints for the enforcement of any penalty under this act shall be heard and determined by two or more justices of the peace acting for the county or other jurisdiction wherein the offence was committed, or for any adjoining county or jurisdiction, with the like authority as though the cause of complaint had arisen within such adjoining county or jurisdiction, provided that the place of hearing the complaint in such other county or jurisdiction be not more than five miles from the place where the offence was committed; and the justices by whom any person shall be fined for any offence against this act may order that such person shall pay the penalty, and also the reasonable costs and charges of such proceedings and conviction, either immediately or within such time as the said justices shall think fit; and in default of payment thereof any justice may cause the same to be levied by distress and sale of the goods and chattels of the party convicted, together with the reasonable costs and charges of such conviction, distress and sale, by warrant under the hand and seal of any such justice; and where the warrant of distress is directed against the goods and chattels of any person being the occupier of a print work, it shall be lawful under such warrant to distrain any goods and chattels found in the said print work which would be liable to be distrained for rent in arrear.

Penalties may be recovered as in 5 Geo. 4, c. 18.

Power of distraining goods in print work where occupier is convicted.

Issue of summons for offences against this act.

33. And be it enacted, that in England and Ireland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or upon oath before him by any other person, that to the best of the knowledge and belief of the inspector, sub-inspector or such other person, such an offence has been committed; and in Scotland a summons for an offence against this act shall be issued by any justice upon complaint being made to him in writing by an inspector or sub-inspector, or by the procurator fiscal, or by any person having a title and interest to prosecute with the concurrence of the procurator fiscal, that to the best of the knowledge and belief of such inspector, sub-inspector, procurator fiscal or other person, such an offence has been committed; and in every such prosecution in Scotland the proceedings shall be summary, and it shall not be necessary to take down in writing more than the substance of the evidence; and no higher or other fees shall be allowed in Scotland to the clerk of court or constables than are allowed to be paid to the sheriff clerk and sheriff officers in causes and prosecutions under the authority of an act passed in the tenth year of the reign of King George the Fourth, intituled "An Act for the more effectual Recovery of Small Debts, and for diminishing the Expenses of Litigation in Causes of small Amount in the Sheriff Courts in Scotland."

10 Geo. 4, c. 55.

Compelling parties to appear and bring register.

34. And be it enacted, that every person who shall be summoned to answer any complaint shall be bound to appear at the time and place mentioned in the summons, and to produce before the justices then and there present every register or other account, paper or notice required by law to be kept by him or his agent, which shall be mentioned in the summons; and if he shall not appear accordingly, then (upon proof of due service of the summons) the justices may hear and determine the case in his absence, or issue their warrant, as hereinafter provided, for enforcing his attendance, and the attendance of any witness who shall refuse or neglect to appear.

35. And be it declared and enacted, that it shall be no objection to the competency of any inspector or sub-inspector to give evidence as a witness in any prosecution under this act that it is brought at the instance of such inspector or sub-inspector, or in Scotland the procurator fiscal or other person as aforesaid. Inspectors and sub-inspectors competent witnesses.

36. And be it enacted, that any justice of the peace, upon any complaint under this act, may summon any witness to appear and give evidence at a time and place appointed for hearing such complaint, and by warrant under his hand and seal may require any person to be brought before the justices by whom the complaint shall be heard who shall neglect or refuse to appear at the time and place appointed in any summons, proof upon oath being first given of personal service of the summons upon the person against whom such warrant shall be granted, and may commit any person coming or brought before such justices who shall refuse to give evidence to the county prison or prison of the place where such offence was committed, there to remain for any time not exceeding one month, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any justice shall be a sufficient warrant to any gaoler or prison keeper for the discharge of such person. Justices may enforce attendance of witnesses.

37. And be it enacted, that every inspector and sub-inspector shall be empowered to summon any person whom he shall charge with having offended against this act, and also all witnesses who may be needed to give evidence concerning the charge; and every such summons shall be of the same effect as if issued by a justice of the peace after complaint upon oath before him, and shall be enforced in like manner, and the like proceedings may be had thereupon, as if complaint upon oath had been made before such justice for such offence; and every constable and other peace officer to whom any such summons shall be directed shall be bound to take charge of and to serve such summons, and in default thereof shall be liable to be punished as if the summons had been issued by a justice of the peace; and every such summons of an offender or witness may be in the form provided in each case, and given in the Schedule (D.) hereunto annexed; and when an inspector or sub-inspector shall summon an offender, he shall give to the same constable or peace officer a statement of the offence alleged to have been committed, who shall deliver it to a justice of the peace usually acting for the division in which the case is to be heard, or to the clerk of any such justice, at least twenty-four hours before the period named in the summons for the appearance of the party charged with such offence. Inspectors and sub-inspectors may summon offenders and witnesses.

38. And be it enacted, that it shall be sufficient, in any information, complaint or other proceeding under this act, to set forth the name of the ostensible occupier or title of the firm by which the occupier employing the workpeople of the print work may be usually known; and the service of any summons, order or notice required by this act, or issued under the authority of this act, and not expressly directed to be personal service, may be made by leaving the same at the dwelling-house of the person to whom the same shall be addressed, or, in the case of summoning or giving an order or notice to the occupier of a print work or to a schoolmaster, by giving a copy thereof in writing to the agent of such occupier, or by sending a copy thereof by the post, directed to the occupier of the print work at the print work, or to the schoolmaster at his school. What shall be deemed sufficient for summons and service thereof.

39. And be it enacted, that any person who shall be convicted of having employed any child, young person or woman in any manner contrary to the provisions of this act, or of employing any child under Penalty for illegally employing children,

young persons, and women.

the age of thirteen years without having obtained the certificate from a schoolmaster required by this act, such person (not being the parent of such child, or the husband of such woman, nor having any direct benefit from the wages of such child or woman) shall for every such offence be adjudged to pay a penalty of not less than twenty shillings and not more than three pounds for each child, young person or woman so illegally employed: provided always, that if the offence shall be the employment of any such child, *young person* (*x*) or woman during the night, the penalty shall be not less than forty shillings nor more than five pounds for each child, *young person* or woman so illegally employed.

Penalty on parents and others interested for conniving at illegal employment.

40. And be it enacted, that every parent and other person who shall have direct benefit from the wages of any child employed in any manner forbidden by this act, who shall wilfully connive at such illegal employment, or who shall neglect to cause such child to attend school as hereinbefore provided, or who, when required by an inspector or sub-inspector, shall fail to produce a certificate of the school attendance of such child, as required by this act, and the husband of any woman employed during the night wilfully conniving at such employment, shall be liable to a penalty of not less than five shillings and not more than twenty shillings for each offence.

Penalty for obstructing inspectors in execution of their duty.

41. And be it enacted, that every person convicted of wilfully obstructing an inspector or sub-inspector in the execution of any of the powers intrusted to him by virtue of this act shall be liable for each offence to a penalty of not less than three pounds and not more than ten pounds.

Penalty for obstructing inspectors at night.

42. And be it enacted, that every occupier of a print work in which an inspector or sub-inspector shall be obstructed in the night, by any attempt to prevent his making a full and complete examination of all parts of the print works, and of every person employed therein, shall be liable to a penalty of not less than twenty pounds, and not more than fifty pounds.

Penalty for giving or using untrue certificates.

43. And be it enacted, that every person convicted of making, giving, signing, countersigning, counterfeiting or making use of any certificate authorized or required by or by virtue of this act, knowing the same to be untrue, or of wilfully making or wilfully conniving at making any false or counterfeited certificate, or any false entry in any register, or any other account, paper or notice required by or by virtue of this act, and also every person convicted of wilfully making and signing a false declaration in any proceedings under this act, shall be liable to a penalty of not less than five pounds and not more than twenty pounds, or to be imprisoned for any time not exceeding six calendar months in the house of correction in the county, town or place where the offence was committed.

Penalty in cases where no special penalty is provided.

44. And be it enacted, that the penalty for any offence against this act for which no special penalty is herein provided shall be any sum not less than two pounds and not more than five pounds.

(*x*) By 9 & 10 Vict. c. 18, s. 3, after reciting this proviso, and that the words "young person" have been twice introduced into the said proviso by mistake, inasmuch as, according to the said act, it is no offence to employ *male* young persons (see sect. 22) as defined in the said act (sect. 1), during the night, it is "declared and enacted, that the said act shall be construed as if in the proviso hereinbefore recited the words 'young person' had not been inserted."

45. And be it declared and enacted, that the non-compliance with any direction contained in any schedule to this act annexed shall be deemed an offence against the provisions of this act. Offences against directions in schedules.

46. And be it enacted, that every person who shall be convicted twice within twelve calendar months for an offence of the same kind against this act shall pay for the second offence any sum not less than one-half of the highest penalty for that offence, and if convicted three times within twelve calendar months for an offence of the same kind shall pay not less than two-thirds of the highest penalty, and if convicted more than three times within twenty-four calendar months for an offence of the same kind shall pay the highest penalty; but a repetition of the same kind of offence shall not be considered as the second or subsequent offences referred to in this enactment, unless such second or subsequent offence shall have been committed after a complaint has been made for the previous offences; and in any case in which a person shall be convicted at any one time for offences against this act, so that the penalties amount in the whole to more than one hundred pounds, the sum of one hundred pounds, together with all the reasonable costs and charges of such proceedings and convictions, may be paid, instead of the penalties for all offences committed by such persons before the day on which the last summons was taken out against him or her. Penalty for second offence.

47. Provided always, and be it enacted, that no person shall be liable to a larger amount of penalties for any repetition from day to day of the same kind of offence than the highest penalty herein appointed for such offence, unless such repetition of offence shall have been committed after a complaint shall have been made for the previous offence; but the offence of employing two or more children or women contrary to law shall be considered a repetition of the same kind of offence within the meaning of this provision. In cases of repetition of offences.

48. And be it enacted, that all penalties for any offence against this act shall be applied under the direction of one of her Majesty's principal Secretaries of State, and shall be paid, on account of the inspector of the district in which the penalty was imposed, to such banker as shall be appointed by such inspector to receive the same; and every person to whom any such penalty shall be paid shall pay over the amount thereof to the banker so appointed, within fourteen days of receiving the same; and it shall be lawful for the Secretary of State to remit the whole or any part of such penalty, and so much thereof as shall not be so remitted, and not otherwise especially appropriated by this act, shall be applied by such inspector, under the direction of one of her Majesty's principal Secretaries of State, in such manner as shall appear best for the establishment or support of day schools for the education of children employed in print works; and so much of an act passed in the sixth year of the reign of his late Majesty, intituled "An Act to provide for the Regulation of Corporations in England and Wales," as provides that certain penalties and forfeitures, if recovered before any justice of any borough having a separate court of quarter sessions of the peace, shall be recovered for and adjudged to be paid to the treasurer of such borough, shall be repealed as to the penalties imposed under this act. Application of penalties. 5 & 6 Will. 4, c. 76.

49. And be it enacted, that whenever any person shall be convicted of any offence against this act, the clerk of the peace where such conviction shall have been filed shall, upon the request in writing of any inspector or sub-inspector, deliver or cause to be delivered to him a copy of the conviction, certified under his hand to be a true copy; and every such copy shall be received as evidence How former conviction may be proved.

of such conviction upon any future proceeding under this act; and for every such copy the clerk shall be entitled to have a fee of one shilling and no more.

Convictions to be filed amongst the records of the county.

50. And be it enacted, that every conviction under this act may be in the form given in the Schedule (D.) to this act annexed, or in any other form more suitable to the case, and shall be certified in England and Ireland to the next general or quarter session of the peace, and in Scotland to the clerk of the justices of the peace, there to be filed amongst the records of the county, riding, division, stewartry, town or place.

No appeal from convictions, except in certain cases.

51. And be it enacted, that no appeal shall be allowed against any conviction under this act, except for an offence punishable, at discretion, by fine or imprisonment, or when the penalty awarded shall be more than three pounds; neither shall any conviction, except as aforesaid, be removable by *certiorari* or bill of advocation into any court whatever; and no information, conviction or other proceeding on any complaint for an offence against this act shall be quashed or deemed illegal for matter of form, or for the want of any averment unnecessary to be proved, or the omission of any word, or for the insertion of any word, in any case in which such omission or such insertion respectively do not affect the essence of the offence, nor for the wrong designation of a name or time or place, where the person, time and place intended shall have been so stated as to have been, in the opinion of the justices by whom the complaint shall have been heard, clearly understood by the person charged with such offence; and it shall not be necessary, in any information, conviction or other proceeding under this act, to define the processes carried on in such print work, or to set out that the print work or process of employment referred to is not within any of the cases excepted, provided that it be therein stated that such print work is a print work within this act; and the proof of being within any such excepted case shall lie upon the party claiming the benefit of such exception.

Appeal.

52. And be it enacted, that any person aggrieved by any such conviction for which an appeal is allowed by this act may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of the conviction for the county or other jurisdiction wherein the cause of complaint shall have arisen; provided that the person so intending to appeal shall give to the inspector or sub-inspector of the district notice in writing of such appeal, and of the cause or matter thereof, within three days after the conviction or order, and seven clear days at the least before such session, and shall also enter into a recognizance with two sufficient sureties before a justice of the peace for the county or other jurisdiction seven clear days at the least before such session, conditioned personally to appear at the said session, and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as shall be by the court awarded; and the court at such session shall hear and determine the matter of appeal, and shall make such order thereon as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction or order the court shall adjudge and order the party to be punished according to the conviction, or to obey the order appealed against, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Who are to exercise the powers of justices.

53. And be it enacted, that in all cases in which a justice of the peace is required or empowered to do any thing under this act, or is named therein, a burgh magistrate shall have within his jurisdiction

the same powers and duties as are herein given to such justice, and shall exercise the same in Scotland; but no complaint preferred for any offence against this act committed in a print work shall be heard by a justice of the peace or burgh magistrate, being an occupier of the print work, or being the father, son or brother of the occupier of the print work, in which the offence set forth in the complaint shall have been committed.

54. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament. Alteration of act.

SCHEDULES to which the Act refers.

SCHEDULE (A.)

SURGICAL CERTIFICATE.

[*To be written or printed on white Paper.*]

Print Works Regulation Act, Victoria, c.

No. . CERTIFICATE of AGE for a CHILD to be employed in the Print Work of situate at in .

I of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] of and residing in has been personally examined by me this day of one thousand eight hundred and and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years; and that the said child is not incapacitated by disease or bodily infirmity from working in the above-named print work for the time allowed by this act.

Signed Certifying Surgeon.

The form of surgical certificate to be given to a child who has obtained a certificate of real age shall be the same as above, omitting the words "and that the said child has the ordinary strength and appearance of a child of at least eight years of age, and that I believe the real age of the said child to be at least eight years," and substituting these words in their place, "and that a certificate of the birth [*or* baptism] of the said child has been produced to me in the form required by this act, proving that the real age of such child is at least eight years."

[*To be written or printed on coloured Paper.*]

Print Works Regulation Act, Victoria, c.

No. . CERTIFICATE of AGE for a YOUNG PERSON to be employed in the Print Work of situate at in .

I of duly appointed a certifying surgeon, do hereby certify, that son [*or* daughter] of and residing in has been personally examined by me this day of one thousand eight hundred and

and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years; and that the said young person is not incapacitated by disease or bodily infirmity from working in the above-named print work for the time allowed by this act.

Signed Certifying Surgeon.

The form of surgical certificate to be given to a young person who has obtained a certificate of real age shall be the same as the above, omitting the words "and that the said young person has the ordinary strength and appearance of a young person of at least thirteen years of age, and that I believe the real age of the said young person to be at least thirteen years," and substituting these words in their place, "and that a certificate of the birth [*or* baptism] of the said young person has been produced to me in the form required by this act, proving that the real age of such young person is at least thirteen years."

The form of surgical certificate to be given in either case by any practitioner who is not a certifying surgeon must be the same as the corresponding form above given, omitting the words "duly appointed a certifying surgeon," and substituting the words "duly authorized by the university [*or* college *or other public body having authority in that behalf*] of to practise surgery [or medicine]," and making the following addition which must be signed by a justice of the peace or burgh magistrate:—

The child [*or* young person] named in the above written certificate has been this day brought before me; and the appearance of the said child [*or* young person] agrees with the description therein given; and I believe the real age of the said child [*or* young person] to be at least [*here insert the word* "eight" *or* "thirteen" *in the case of a young person*] years; and I declare that I have no beneficial interest in and am not the occupier of any print work, and that I am not the father, son or brother of the occupier of any print work.

Dated this day of one thousand eight hundred and .

Signed C. D., Justice,
[*or* Burgh Magistrate.]

In every surgical certificate of age the day of the month on which it shall be granted shall be written in words, and not in figures.

So soon as any certificates authorized by this act to be received as proof of the age of any persons shall be obtained by the occupier of a print work or his agent, they shall be fixed in a book to be called "The Age Certificate Book," in the order of the dates at which they shall have been respectively received; and such certificates shall be numbered in the order in which they are so fixed in the book; but the certificates for children shall be kept in a separate and distinct place in the said book, or in a separate book, and shall be marked with a series of running numbers distinct from that of the certificates for young persons.

So soon as any certificate of age authorized by this act shall be obtained, the number hereinbefore required to be set against each certificate shall be set against the name of the child or young person to whom such certificate has been granted in the first column of the register of the persons employed required by this act to be kept in each factory.

If a surgeon shall have refused to grant a certificate of age to any child or young person the word "refused" shall be written by the surgeon in the column of the register where the numbers of the certificates are required to be inserted.

Print Works Regulation Act, *Victoria, c.*

CERTIFICATE REFUSED.

I of duly appointed a certifying surgeon, do hereby declare, that son [*or* daughter] of residing in has been personally examined by me this day of one thousand eight hundred and and that in my opinion the said child [*or* young person] has not the ordinary strength and appearance of a child of at least eight years of age [*or* of a young person of at least thirteen years of age], or [*or* and] is incapacitated by disease and bodily infirmity from working in a print work for the time allowed by this act.

Signed Certifying Surgeon.

N.B.—The words within brackets shall be in the handwriting of the certifying surgeon, who shall insert the reason of his refusal to be either on account of deficient age or bodily infirmity, or both, as the case may be.

Print Works Regulation Act, *Victoria, c.*

SCHOOL CERTIFICATE BOOK (*y*).

I hereby certify, that the child A. B., son [*or* daughter] of C. D. and E. F., residing in attended the school kept by me at in the parish and county of for the number of hours and at the time on each day specified in the columns opposite to his [*or* her] name.

During the week ending on Saturday the day of 18 .

Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Total number of hours during this Week.
From	To	From	To	From	To	From	To	From	To	From	To	

Signed Schoolmaster,
this day of 18 .

(*y*) Repealed by 10 & 11 Vict. c. 70, *post.*

During the week ending on Saturday the day of 18 .

Monday.		Tuesday.		Wednesdy.		Thursday.		Friday.		Saturday.		Total number of hours during this Week.
From	To	From	To	From	To	From	To	From	To	From	To	

Signed Schoolmaster,
this day of 18 .

Under the column headed with the days of the week the periods of the day that each child attends school shall be stated, as thus, from nine to twelve, or from two to five, or any other time, as the case may be.

The time when each child attends school, or the word "Absent," shall be stated in the column for each day in the handwriting of the schoolmaster; and no certificate shall be valid unless the schoolmaster shall, in his own handwriting, subscribe to it his christian and surname in full.

Each certificate book shall contain twenty-six forms similar to the above, and shall be valid for the purposes of this act for six months only, either from the first day of January to the last day of June, or from the first day of July to the last day of December of any year; and at the expiration of either period of six months such certificate book, containing the school attendance of the child certified, shall be delivered by the parent or other person having direct benefit from the wages of such child to the occupier of the print work where such child is employed, and if the child cease to be employed in the print work to the occupier of which such school certificate book was delivered, the parent or other person as aforesaid shall be entitled, on demand, to have the said certificate book restored to him.

SCHEDULE (B.)

Registers.

Form of the Register of Children.

List of Children employed in this Print Work.

No. of Reference to Age Certificate Book, as required by Schedule (A.)	NAMES.		Date of first day of being employed or re-employed.			When any Child ceases to be employed, insert opposite the name the word *Left;* and when any Child completes his thirteenth year of age, the word *Thirteen.*	School at which the Child attends.	
	Surname.	Christian Name.	Month.	Day.	Year.		Name of the Master.	Situation of the School.

This register shall contain the name of every child employed in the print work, to be entered in alphabetical order, successively when engaged to work, whether for the first time, or, after having left, when re-engaged to work.

At the beginning of this register shall be inserted—

1. The name of the occupier or firm.
2. The name of the print work, the place, township, parish and county where it is situated, and the post office to which the occupier desires his letters to be directed.
3. The nature of the work carried on.
4. The clock by which the employment of the workers in the print work is regulated.

Every alteration in any of the above particulars shall be inserted immediately after the alteration shall have been made.

Form for the Register of Young Persons.

List of Young Persons employed in this Factory.

No. of Reference to Age Certificate Book, as required in Schedule (A.)	NAMES.		Date of first day of being employed or re-employed.			When any young person ceases to be employed, insert opposite the name the word *Left*; and when any young person completes his sixteenth year of age, the word *Sixteen*.
	Surname.	Christian Name.	Month.	Day.	Year.	

The visits of the certifying surgeon to the print work shall be recorded in this register in the manner following.

Date of Visit.	Number of Persons presented for Examination.	Number of Certificates granted.	Signature of Surgeon.
	*	†	

* If the surgeon shall be told that there is no child or young person in the print work to be examined at the time of his visit he shall insert in this column the word "None."

† If none granted he shall insert the word "None."

SCHEDULE (C.)

NOTICE TO BE FIXED UP IN THE PRINT WORK.

Form for the Notice to be fixed up of the Names and Addresses of the Inspector and Sub-Inspector, and the Clock for regulating the Hours of Work in the Print Work.

Name and address of the inspector of the district .. .. ..
Name and address of the sub-inspector of the district .. .. ..
Name and address of the surgeon who grants certificates of age for the print work .. .. ..
Clock by which the hours of work are regulated .. .. ..

SCHEDULE (D.)

FORMS OF SUMMONSES AND CONVICTION.

Form of Summons to be issued by an Inspector or Sub-Inspector against a Person who has committed an Offence.

County of
[*or* borough of]
To the constable of .

Whereas it appeareth to me, I. F., one of her Majesty's inspectors [*or* sub-inspector] of factories, that A. D. of in the county [*or* borough, *&c.*] of hath offended against the act made in the year of her Majesty's reign, intituled [*here set forth the title of this act*]; forasmuch as he the said A. D., on the day of in the year of our Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*]: These, therefore, are to require you forthwith to summon the said A. D. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of who shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to answer to the said charge, and to be further dealt with according to law, and be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord .

(Signed) I. F., Inspector [*or* Sub-Inspector].

Form of Summons of a Witness to be issued by an Inspector or Sub-Inspector.

County of
[*or* borough of

To the constable of

Whereas it appeareth to me, I. F., one of her Majesty's inspectors [*or* sub-inspector] of factories, that A. D. of in the county [*or* borough, *&c.*] of hath offended against the act made in the year of her Majesty's reign, intituled [*here set forth the title of the act*]: forasmuch as he the said A. D., on the day of in the year of our Lord at in the county [*or* borough, *&c.*] of did [*here set forth the substance of the charge*], and that B. P. of in the county [*or* borough, *&c.*] is a material witness to be examined concerning the said charge: These, therefore, are to require you forthwith to summon the said B. P. to appear before such two or more of her Majesty's justices of the peace acting in and for the county [*or* borough, *&c.*] of as shall be present at in the county [*or* borough, *&c.*] of on the day of at the hour of in the noon of the same day, to testify his knowledge concerning the premises, and be you then there to certify what you have done in the premises. Herein fail not.

Given under my hand, this day of in the year of our Lord

(Signed) I. F., Inspector [*or* Sub-Inspector].

Form of Conviction.

County of
[liberty *or* borough, *as the case way be*].

BE it remembered, that on the day of in the year one thousand eight hundred and A. B. [*describe the offender*] is convicted before us J. P. and K. Q., two of her Majesty's justices of the peace for the county [liberty *or* borough, *as the case may be*], of in pursuance of an act passed in the year of the reign of Queen Victoria, intituled [*here insert the title of this act*], for that he [*describe the offence*].

Given under our hands and seals, the day and year above written.

J. P. (L. S.)
K. Q. (L. S.)

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8 & 9 Vict. c. 77.

An Act to make further Regulations respecting the Tickets of Work to be delivered to Persons employed in the Manufacture of Hosiery, in certain cases. [4th August, 1845.]

5 Geo. 4, c. 96.

Whereas by an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," it was enacted (*z*), amongst other things, that "with

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(*z*) Sect. 18, *ante*, p. 348.

every piece of work given out by the manufacturer to a workman to be done, there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon:" And whereas it is expedient that, so far as relates to persons employed in the woollen, worsted, linen, cotton and silk hosiery manufactures, such further provision should be made for delivery to them of a note or ticket of work as hereinafter is expressed: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of January in the year one thousand eight hundred and forty-six, when any manufacturer of hosiery, or the agent of any such manufacturer, gives out to a workman the materials to be wrought, such manufacturer or agent shall at the same time deliver to such workman a printed or written ticket, signed by such manufacturer, containing the particulars of the agreement between such manufacturer and such workman, as in the schedule to this act annexed; and such manufacturer or agent delivering such ticket shall make or cause to be made, and shall preserve until the work contracted to be done shall have been completed or paid for, a duplicate of such note or ticket.

Manufacturer to deliver with materials a ticket of work.

2. And be it enacted, that in the event of any dispute between the manufacturer or his agent and the workman, such ticket, and the said duplicate thereof, shall be required to be produced, and shall, together or either of them, be evidence of all things mentioned therein or respecting the same.

Ticket to be evidence.

3. Provided always, and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to a manufacturer or his agent, such piece of work shall be produced in order to adjudication, or if not produced, shall be deemed and taken to have been sufficiently and properly executed.

When dispute arises as to imperfect execution the work to be produced.

4. And be it enacted, that if any manufacturer or agent shall neglect or refuse to deliver such ticket to such workman as aforesaid, with the materials so given out, and if such workman shall complain thereof to any justice of the peace having jurisdiction in the place where the materials shall have been delivered out, or where the workman shall reside, such justice may summon such manufacturer or agent to attend before two justices at a time or place appointed for hearing the complaint, and set forth in the summons; and if the person to whom such summons so directed appears according to the tenor thereof, or if he does not appear, and the due service of the summons is proved, the said justices may proceed to hear and determine the complaint; and if such neglect or refusal as aforesaid be proved, either by the confession of the party complained against, or by the oath of the complainant, or of any other credible witness or witnesses, such justices may convict such offender, and may, upon such conviction, adjudge him to pay such penalty not exceeding five pounds, together with the costs attending the conviction, as such justices shall think fit, and the party so adjudged to pay such penalty and costs shall pay the same accordingly; provided always, that in all convictions of adjudications under this act, one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation or employment to which this act extends, and shall not be the father, son or brother of any such person.

Penalty on manufacturer for non-delivery of ticket.

5. And be it enacted, that if any of the parties to the said complaint shall make oath before any justice having cognizance of such

Power of summoning witnesses.

complaint that he or she believes that the attendance of any person as a witness will be material to the hearing of such complaint, such justice may summon such person, having been paid or tendered a reasonable sum for his expenses, to appear and give evidence on oath at a time and place set forth in the said summons; and if any person so summoned shall not appear at the time and place set forth in the said summons, and shall not make excuse for the default to the satisfaction of the justices there present, and if the due service of the summons be proved, or if such person appearing according to the summons shall not submit to be examined as a witness, then such justices may adjudge such person so making default in appearing or refusing to give evidence to pay such penalty not exceeding two pounds, as such justices shall think fit, and the party so adjudged to pay such penalty shall pay the same accordingly.

Service of summons.

6. And be it enacted, that every summons required by this act shall be served by delivering the same to the person summoned, or by leaving the same at his or her usual place of abode, twenty-four hours at least before the time appointed by the summons for such person to appear.

Levying and application of penalty.

7. And be it enacted, that if any such penalty or costs so adjudged by any justices to be paid is not paid immediately upon adjudication, such justices may issue their warrant to distrain and sell the goods and chattels of the person so adjudged to pay the same, for the amount thereof, with costs; and the proceeds of such distress, after paying the penalty and costs, and the costs of such distress and sale, shall be paid over to the person convicted; and the said penalty shall be paid over to the sheriff or other proper officer of the county, city, borough or place in which such conviction shall take place, for her Majesty's use, and shall be returned to the court of quarter sessions, under the provisions of an act passed in the third year of the reign of King George the Fourth, intituled "An Act for the more speedy Return and levying of Fines, Penalties, and Forfeitures, and Recognizances estreated."

3 Geo. 4, c. 46.

No *certiorari* allowed, nor distress unlawful for want of form.

8. And be it enacted, that no order or conviction, or proceeding touching the same respectively, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of her Majesty's superior courts of record; and that when any distress shall have been made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any defect or want of form in the summons, warrant, conviction, warrant of distress, or other proceedings in relation thereto, nor shall the party distraining be deemed a trespasser from the beginning, on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for special damage (if any) by action on the case.

Interpretation of act.

9. And be it enacted, that the word "manufacturer" in this act shall be understood to mean any person furnishing the materials of work to be wrought into hosiery goods, to be sold or disposed of on his own account, and the word "agent" to include any person conveying or delivering the same to the workman, and the word "workman" any person actually employed in the manufacture of the same.

Alteration of act.

10. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of Parliament.

SCHEDULE.

If the material to be manufactured be into stockings:

Gauge.
Ribbed or plain.
What kind of material.
Size.
Jacks in width.
Mark.
Length of leg.
Length of foot.
Narrowings in leg.
Narrowings in heel.
Narrowings in gusset.
Narrowings in toe.
Dumps or clocks.
Bound heels or toes.
Wrought heels or cut.
Wrought feet or cut.
Turnings in leg.
Welted or not.
Weight per dozen.
Price per dozen pair of making legs.
Price per dozen pair of making feet.
Name of party putting out the work.
Name of artificer.

If the material to be manufactured be into socks:

Gauge.
Ribbed or plain.
What kind of material.
Size.
Jacks in width.
Mark.
Length of leg with top.
Length of foot.
Narrowings in heel.
Narrowings in gusset.
Narrowings in toe.
Cut or wrought heels.
Cut or wrought feet.
Price per dozen pair.
Name of party putting out the work.
Name of artificer.

If the material to be manufactured be into gloves:

Gauge.
Ribbed or plain.
What kind of material.
Size.
Jacks in width of hand.
Jacks in width of finger.
Mark.
Length of hand.
Length of finger.

What kind of welts.
Plaited or not.
What figure in back of hand.
Weight per dozen.
Price per dozen pair of making hands.
Price per dozen pair of making fingers.
Name of party putting out the work.
Name of artificer.

If the material to be manufactured be into shirts:
Gauge.
Ribbed or plain.
What kind of material.
Size.
Jacks in width of body.
Jacks in width of sleeve.
Mark.
Length of body.
Length of sleeve.
Fashioned or not.
Welted or not.
Weight per dozen.
Price per dozen of making bodies.
Price per dozen pair of making sleeves.
Name of party putting out the work.
Name of artificer.

If the material to be manufactured be into caps:
Gauge.
Ribbed or plain.
Material.
Jacks in width.
Fashion.
Striped or plain.
Weight per dozen.
Price per dozen.
Name of party putting out the work.
Name of artificer.

If the material to be manufactured be into any other description of hosiery:
Gauge.
Length.
Width.
Weight.
Price.
Fashion.
Name of party putting out the work.
Name of artificer.

8 & 9 VICT. C. 128.

An Act to make further Regulations respecting the Tickets of Work to be delivered to Silk Weavers in certain Cases.

[9th August, 1845.]

Whereas by an act passed in the fifth year of the reign of King George the Fourth, intituled "An Act to consolidate and amend the Laws relative to the Arbitration of Disputes between Masters and Workmen," it was enacted (*a*), amongst other things, that "with every piece of work given out by the manufacturer to a workman to be done there shall (if both parties are agreed) be delivered a note or ticket in such form as the said parties shall mutually agree upon:" and whereas it is expedient that, so far as relates to silk weavers, such further provision should be made for delivery to them of a note or ticket of work as hereinafter is expressed: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of January in the year one thousand eight hundred and forty-five when any manufacturer of silk goods or of goods made of silk mixed with other materials, or the agent of any such manufacturer, gives out to a weaver of such goods a piece of warp to be woven, such manufacturer or agent shall at the same time deliver to such weaver (unless both parties shall by writing under their respective hands agree to dispense therewith) a printed or written ticket, signed by such manufacturer or agent, containing the following particulars of the agreement between such manufacturer or agent and such weaver (that is to say): 5 Geo. 4, c. 96. Manufacturer to deliver with warp a ticket of work.

The count or richness of the warp or cane:
The number of shoots or picks required in each inch:
The number of threads of weft to be used in each shoot:
The name of the manufacturer, or the style of the firm under which he carries on business:
The weaver's name, with the date of the engagement:
And the price in sterling money agreed on for executing each yard imperial standard measure of thirty-six inches of such work in a workmanlike manner:

And such manufacturer or agent delivering such ticket shall make or cause to be made, and shall preserve until the work contracted to be done shall have been completed or paid for, a duplicate of such note or ticket.

2. And be it enacted, that in the event of any dispute between the manufacturer or his agent and the workmen, such ticket and the said duplicate thereof shall be required to be produced, and shall, together or either of them, be evidence of all things mentioned therein, or respecting the same. Ticket to be evidence in cases of dispute:

3. Provided always, and be it enacted, that where the subject of dispute relates to the alleged improper or imperfect execution of any work delivered to any manufacturer or his agent, such piece of work shall be produced, in order to adjudication, or if not produced, shall be deemed and taken to have been sufficiently and properly executed. and work to be produced in order to adjudication.

4. And be it enacted, that if any of the parties to the said complaint shall make oath before any justice having cognizance of such complaint, that he or she believes that the attendance of any person Power of summoning witnesses.

(*a*) Sect. 18, *ante*, p. 348.

as a witness will be material to the hearing of such complaint, such justice may summon such person, having been paid or tendered a reasonable sum for his expenses, to appear and give evidence on oath before him at a time and place set forth in the said summons; and if any person so summoned shall not appear at the time and place set forth in the said summons, and shall not make excuse for the default to the satisfaction of such justice, and if the due service of the summons be proved, or if such person appearing according to the summons shall not submit to be examined as a witness, then such justice may adjudge such person so making default in appearing or refusing to give evidence to pay such penalty not exceeding five pounds as such justice shall think fit, and the party so adjudged to pay such penalty shall pay the same accordingly.

Service of summons.

5. And be it enacted, that every summons required by this act shall be served by delivering the same to the person summoned, or by leaving the same at his or her usual place of abode, twenty-four hours at least before the time appointed by the summons for such person to appear.

Levying and application of penalty.

6. And be it enacted, that if any such penalty or costs so adjudged by any justice to be paid is not paid immediately upon adjudication such justice may issue his warrant to distrain and sell the goods and chattels of the person so adjudged to pay the same for the amount thereof, with costs; and the proceeds of such distress, after paying the penalty and costs, and the costs of such distress and sale, shall be paid over to the person convicted; and the said penalty shall be paid over to the sheriff or other proper officer of the county, city, borough or place in which such conviction shall take place, for her Majesty's use, and shall be returned to the court of quarter sessions, under the provisions of an act passed in the third year of the reign of King George the Fourth, intituled "An Act for the more speedy Return and levying of Fines, Penalties and Forfeitures, and Recognizances estreated."

3 Geo. 4, c. 46.

Recovery of wages and sums due for work.

7. And be it enacted, that if any silk manufacturer or other party employing, contracting or engaging with any person for any work in any branch of the said manufacture, or connected therewith or incidental thereto, or for specific work or otherwise, and whether such person is to be paid according to the nature or amount of the work done, the time employed, or any other manner, shall not from time to time pay and discharge all such sums of money and wages as shall be justly due and payable to any such person, it shall be lawful for a justice of the peace, on complaint made for that purpose, to summon such manufacturer or other party to appear at a time and place to be named in such summons, and for any two or more justices of the peace to hear and determine such complaint, and order payment of such sum as shall appear to such justices to be justly due and payable, together with costs for loss of time and recovering the same, and in default of payment immediately, or within such period as the said justices shall direct, the said justices shall issue their warrant to levy the same by distress and sale of the goods and chattels of the said manufacturer or other party; and the said justices, if they shall think fit, may also, by order in writing, authorize such person to return his work unfinished; and such justices shall also fine such manufacturer or other party for such neglect of payment, if the first offence five pounds and for the second ten pounds, and five pounds extra for every succeeding offence, unless the said manufacturer or other party shall deliver to the said person employed a notice in writing, within four-and-twenty hours after such refusal to pay to the said person employed the amount of wages due, stating

the reasons for such refusal in full, and that the said manufacturer or other party intends to have such work arbitrated.

No *certiorari* to be allowed.

8. And be it enacted, that no order or conviction or proceeding touching the same respectively shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of her Majesty's superior courts of record; and that when any distress shall have been made for levying any money by virtue of this act the distress itself shall not be deemed unlawful, nor the party making the same a trespasser, on account of any defect or want of form in the summons, warrant, conviction, warrant of distress, or other proceedings in relation thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed by him, but the person aggrieved by such irregularity may recover full satisfaction for special damage (if any) by action on the case.

Act may be amended, &c.

9. And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of Parliament.

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10 & 11 VICT. c. 29.

An Act to limit the Hours of Labour of Young Persons and Females in Factories (*b*). [8th June, 1847.]

Whereas an act was passed in the fourth year of the reign of his late Majesty, intituled "An Act to regulate the labour of Children and Young Persons in the Mills and Factories of the United Kingdom" (*c*): and another act was passed in the session of Parliament held in the seventh and eighth years of the reign of her present Majesty, intituled "An Act to amend the Laws relating to Labour in Factories" (*d*): and by the said first-mentioned act it was provided, that no person under the age of eighteen years should be employed in any such mill or factory as in the said act is mentioned, in any such description of work as thereinbefore specified, more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as thereinafter is provided; and by the said last-mentioned act it was provided, that no female above the age of eighteen years should be employed in any factory as defined by the said act, save for the same time and in the same manner as young persons (by the said act defined to be persons of the age of thirteen years and under the age of eighteen years) might be employed in factories: And whereas it is expedient to alter the said acts for the purpose of further restricting the hours of labour of young persons and females in factories: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, notwithstanding any thing in the said acts contained, from the first day of July one thousand eight hundred and forty-seven no person under the age of eighteen years shall be employed in any such mill or factory, in such description of work as in the said first-mentioned act is specified, for more than eleven hours in any one day, nor for more than sixty-three hours in any one week, except as in the said act is provided; and

3 & 4 Will. 4, c. 103.

7 & 8 Vict. c. 15.

Limiting the hours during which persons are to be employed in mills and factories.

(*b*) See also 16 & 17 Vict. c. 104, *post.*

(*c*) *Ante*, p. 427.

(*d*) *Ante*, p. 458.

that from the said first day of July one thousand eight hundred and forty-seven the said two acts before mentioned shall in all respects be construed as if the provision in the provision in the (*e*) said first-mentioned act contained, as to persons under the age of eighteen years working in mills and factories, had been confined to eleven hours instead of twelve hours in any one day, and to sixty-three hours in any one week instead of sixty-nine hours.

Limiting the number of hours for which persons under eighteen years of age are to be employed.

2. And be it enacted, that from the first day of May one thousand eight hundred and forty-eight no person under the age of eighteen years shall be employed in any such mill or factory, in such description of work as in the said first-mentioned act is specified, for more than ten hours in any one day nor more than fifty-eight hours in any one week, except as in the said act is provided; and that from the first day of May one thousand eight hundred and forty-eight the said two acts shall in all respects be construed as if the provision in the said first-mentioned act contained, as to persons under the age of eighteen years working in mills and factories, had been confined to ten hours instead of twelve hours in any one day, and fifty-eight hours in any one week instead of sixty-nine hours.

Act extended to females above eighteen.

3. And be it enacted, that the restrictions respectively by this act imposed as regards the working of persons under the age of eighteen years shall extend to females above the age of eighteen years.

Recited acts and this act to be construed as one act.

4. And be it enacted, that the said two hereinbefore-mentioned acts as amended by this act, and this act, shall be construed together as one act.

Act may be amended, &c.

5. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of Parliament.

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10 & 11 Vict. c. 70.

An Act to amend the Law as to the School Attendance of Children employed in Print Works. [22nd July, 1847.]

8 & 9 Vict. c. 29.

Whereas it is expedient that so much of an act passed in the ninth year of the reign of her Majesty, intituled "An Act to regulate the Labour of Children, Young Persons and Women in Print Works" (*f*), as relates to the school attendance of children employed in print works, should be amended: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that those parts of the said act which in the copies thereof printed by the Queen's printer are printed as separate clauses, and severally numbered 23, 24 and 25, and also so much of the schedule annexed to the said act marked (A.) as relates to certificates of school attendance shall be repealed from and after the first day of August in the year one thousand eight hundred and forty-seven; provided that all certificates given before the said first day of August shall be as valid as if this act had not been passed, and all offences committed before the said first day of August against any of the enactments hereby repealed shall be dealt with and punished as if this act had not been passed.

Sections 23, 24 and 25, and part of Schedule (A.) of recited act repealed.

(*e*) *Sic.* (*f*) *Ante*, p. 493.

2. And be it enacted, that the master of any school which shall be attended by children employed in a print work shall keep a register of their names and attendance, and if the inspector of the district shall disapprove of the form of register adopted by the schoolmaster it shall be kept in such other form as the inspector may direct. Schoolmaster to keep a register of children's attendance.

3. And be it enacted, that after the said first day of August the occupier of every print work shall, before employing any child therein, obtain from a schoolmaster a certificate, according to one of the forms and according to the directions given in the schedule marked (A.) to this act annexed, that such child had attended school for at least thirty days and not less than one hundred and fifty hours during the half-year immediately preceding the first day of the employment of such child, or if it shall have left the said print works and shall be again employed therein, the said school attendance shall have been during the half-year immediately preceding the first day of such re-employment, and such school attendance shall be after the hour of eight of the clock in the morning, and before the hour of six of the clock in the evening; but no attendance of less than two and a half hours on any one day shall be reckoned as any part of the said one hundred and fifty hours, nor shall any attendance on any one day for more than five hours be reckoned for more than five hours: and a like certificate shall be obtained at the beginning of each period of six calendar months during which the employment of such child shall be continued in that print work; and such occupier shall keep every such certificate so long as such child shall continue in his employment for twelve calendar months after the date thereof, and shall produce the same to any inspector or sub-inspector when required during such period. Occupiers of print works to obtain certificate from schoolmaster of child's attendance at school.

4. And be it enacted, that from and after the said first day of August the forms of certificates of school attendance of children employed in print works shall be in one of the forms given in the schedule marked (A.) annexed to this act. Certificate to be given according to schedule.

5. And be it enacted, that this act and the said act as amended by this act shall be construed together and as one act. Acts to be construed together.

6. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of Parliament. Act may be amended, &c.

[*See the Schedule, next page.*]

SCHEDULE to which the foregoing Act refers.

SCHEDULE (A.)

I.—*Form of School Certificates for one Child.*

I hereby certify, that the child A. B., son [*or* daughter] of C. D. and E. F., residing in attended the school kept by me at for the number of hours and at the time on each day specified in the columns opposite to his [*or* her] name.

During the several weeks ending the day, month, and year stated in the first column.

Week ending Saturday.			Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Total No. of hours during this Week.	Signature of School Master.	Date of Signing.
Day.	Month.	Year.	From	To	From	To	From	To	From	To	From	To	From	To			

No part of the school attendance certified shall be valid for a longer time than six months after the date of such attendance; and if a child for whom this form of certificate has been given shall cease to be employed in the print work to the occupier of which such school certificate was delivered, the child's parent, or any person having direct benefit from the wages of such child, shall be entitled on demand to have the said certificate restored to him.

II.—*Form of School Certificate which may be used when two or more Children employed in the same Print Work attend the same School.*

I hereby certify, that the children whose names are under-written, employed in the print work of at in the parish of and county of attended for the number of hours and at the time specified in the columns opposite to their respective names, at the school kept by me at in the parish of and county of

During the week ending on Saturday the day of 18 .

Child's Name.		Mon.		Tues.		Wedns.		Thurs.		Friday.		Satur.		Total No. of hours during this Week.
Surname.	Christian Name.	From	To	From	To	From	To	From	To	From	To	From	To	

(Signed) Schoolmaster.

This day of 18 .

General Directions applicable to both Forms.

In the columns headed with the days of the week, the hours of attendance shall be stated; as thus, from Nine to Twelve, or from Two to Five, or any other time as the case may be; and the schoolmaster shall, in his own handwriting, fill up the date when the week ends during any part of which the child shall have attended his school.

The hours of school attendance, or the word "absent," shall be stated in the column for each day, in the handwriting of the schoolmaster; and no certificate shall be valid, unless the schoolmaster shall in his own handwriting subscribe to it his christian and surname in full, affixing the date when he signs the same.

13 & 14 Vict. c. 54.

An Act to amend the Acts relating to Labour in Factories (*f*).
[5th August, 1850.]

3 & 4 Will. 4, c. 103.

Whereas by an act passed in the fourth year of the reign of his late Majesty, intituled "An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom," it was enacted (*g*), that no person under the age of eighteen years should be employed in any mill or factory as in the said act mentioned, in any such description of work as therein specified, more than twelve hours in any one day, except as thereinafter provided: and whereas by an act passed in the seventh year of the reign of her present Majesty, intituled "An Act to amend the Laws relating to Labour in Factories," it was enacted (*h*), that the hours of work of children and young persons in every factory should be reckoned from the time when any child or young person should first begin to work in the morning in such factory; and by the same act it was enacted (*i*) that no female above the age of eighteen years should be employed in any factory, save for the same time and in the same manner as young persons might be employed in factories: and whereas by an act passed in the tenth year of the reign of her present Majesty, intituled "An Act to limit the Hours of Labour of Young Persons and Females in Factories" (*k*), the hours of labour of young persons and females in factories were further restricted as therein is mentioned: and whereas it is expedient to amend the said hereinbefore recited acts: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present Parliament assembled, and by the authority of the same, that, save as hereinafter mentioned, so much of the said acts as restricts or limits the hours of the employment or labour of young persons, and of females above the age of eighteen years, shall be repealed, and after the passing of this act no young person, and no female above the age of eighteen years, shall be employed in any factory before six of the clock in the morning or after six of the clock in the evening of any day (save to recover lost time, as hereinafter provided), and no young person, and no female above the age of eighteen years, shall be employed in any factory, either to recover lost time or for any other purpose, on any Saturday after two of the clock in the afternoon.

7 & 8 Vict. c. 15.

10 & 11 Vict. c. 29.

No young person or female to be employed before six in the morning or after six in the afternoon, or on Saturdays after two in the afternoon.

Provision of 7 & 8 Vict. c. 15, requiring notices of times of beginning and ending work to be hung up, repealed.

2. And be it enacted, that so much of the said secondly recited act as requires notice in the form given in the Schedule (C.) to such act of the hours of work of all young persons, and females above the age of eighteen years, employed in the factory, to be hung or fixed up in any factory, and so much of the same act as enacts that in any complaint of the employment of any person in a factory otherwise than is allowed by that act the time of beginning work in the morning which shall be stated in any notice fixed up in the factory, signed by the occupier or his agent, shall be taken to be the time when all persons in the factory, except children beginning to work in the afternoon, began work on any day subsequent to the date of such notice, so long as the same continued fixed up in the factory, shall be repealed.

(*f*) See also 16 & 17 Vict. c. 104, *post*; 19 & 20 Vict. c. 38, *post*.

(*g*) Sect. 2, *ante*, p. 428.

(*h*) Sect. 26, *ante*, p. 466.

(*i*) Sect. 32, *ante*, p. 468.

(*k*) See the act, *ante*, p. 521.

3. And whereas, by the said secondly recited act it was enacted, that the times allowed for meal times, as provided by the said firstly recited act, should be taken between the hours of half-past seven in the morning and half-past seven in the evening: be it enacted, that the times allowed for such meal times as aforesaid shall be taken between the hours of half-past seven in the morning and six in the evening; and, subject to such alteration as aforesaid, all the provisions of the said firstly and secondly recited acts concerning meal times and notice of meal times shall remain applicable to all young persons, and to all females above the age of eighteen years, employed in any factory.

Meal times to be taken between half-past seven in the morning and six in the evening.

4. And whereas by the said secondly recited act it was enacted, that in any factory in which any part of the machinery was moved by the power of water the time which should have been lost by stoppages from want of water, or from too much water, might be recovered within six months next after the stoppage, between the hours specified in the said firstly recited act as those within which time lost by drought or excess of water might be recovered, and that in order to recover time so lost any child or young person might be employed one hour in each day more than the time to which the ordinary labour of children and young persons respectively was restricted by law, except on Saturday: be it enacted, that no young person, and no female above the age of eighteen years, shall, in order to recover time so lost as aforesaid, be employed after seven of the clock in the evening of any day; and the times before six of the clock in the morning and after six of the clock in the evening during which any such young person or female is so employed in any day shall not together exceed one hour.

Young persons or females not to be employed under 7 & 8 Vict. c. 15, in recovering lost time after seven in the evening.

5. And whereas by the said secondly recited act it was enacted, that in any factory in which any part of the machinery was moved by the power of water, when the stream was so diminished by drought or swollen by flood during any part of the day that any part of the manufacturing machinery driven by the water-wheel had been stopped by reason of such drought or flood, the young persons who would have been employed at such machinery might recover such lost time during the night next following the said day, unless the said day were Saturday; provided that no such young person should be employed during any twenty-four consecutive hours for a greater number of hours than that to which the ordinary daily labour of such young persons in factories was otherwise restricted by law, and that no young person so employed in the night should work more than five hours without an entire cessation from work of at least thirty minutes: be it enacted, that for the purposes of the last recited enactment the word "night" shall include the whole period between six of the clock in the evening and six of the clock in the morning; and no young person, and no female above the age of eighteen years, shall be employed to recover such lost time as last aforesaid during any twenty-four consecutive hours for more than ten hours and half of another hour; and, save as hereinbefore mentioned, young persons and females may be employed to recover lost time according to the provisions of the said secondly recited act.

Time during which young persons and females may be employed under 7 & 8 Vict. c. 15, s. 34, in recovering lost time.

6. Provided always, and be it enacted, that during all or part of the period between the thirtieth day of September of any year and the first day of April of the following year, young persons, and females above the age of eighteen years, may be employed, except on Saturday, between the hours of seven of the clock in the morning and seven of the clock in the evening, instead of the hours herein-

Power to employ young persons from seven in the morning to seven in the evening,

from 30th Sept. to 1st April, under certain regulations.

before limited, under the following regulations and conditions; (that is to say) notice signed by the occupier of any factory or his agent of the intention to employ young persons and females under this provision, specifying the period, not being less than one month, during which they are to be so employed in such factory, shall be given to one of the inspectors of factories, and a notice to the like effect, in such form as shall be approved by such inspector, and signed by such occupier, or his agent, and by such inspector, shall be hung or fixed up, and during the period specified in the notice shall be kept fixed up, according to the directions for other notices in the said secondly recited act, in such factory; and during the period specified in such notice young persons, and females above the age of eighteen years, may be employed in such factory after six of the clock and not later than seven of the clock in the evening of any day, except Saturday; and during the period specified in such notice (save to recover lost time as herein provided) no young person, and no female above the age of eighteen years, shall be employed in such factory before seven of the clock in the morning of any day, except Saturday; and the provisions hereinbefore contained shall, as to every day, except Saturday, during the period specified in such notice, take effect as if seven of the clock in the morning and seven of the clock in the evening were throughout substituted for six of the clock in the morning and six of the clock in the evening respectively.

Repeal of provision in 7 & 8 Vict. c. 15, as to children above eleven years of age employed solely in winding and throwing of raw silk;

and in lieu thereof children above eleven may be employed as young persons.

7. And whereas by the said secondly recited act it was enacted, that any child above eleven years of age, employed solely in winding and throwing of raw silk, and who shall have obtained the surgical certificate required by this act of his having completed his eleventh year, may work, without any proof of having attended a school, for any time not exceeding ten hours on any working day, but not after half-past four of the clock in the afternoon of any Saturday: and whereas it is expedient that so much of the said recited act should be repealed: be it therefore enacted, that so much of the said act as is hereinbefore recited shall be and the same is hereby repealed; and in lieu thereof it shall be lawful for any child employed solely in the winding and throwing of raw silk, who shall have obtained the surgical certificate required by the said secondly recited act of his having completed his eleventh year, to be employed in all respects as young persons may be employed under this act.

Young persons and females employed during meal times, &c., to be held to be employed contrary to acts.

8. And be it enacted, that every young person, and every female above the age of eighteen years, who shall be employed in any factory, or shall be allowed to remain in any room where any manufacturing process is then carried on in any factory, during any part of the times which by the notice then fixed up in such factory in that behalf are mentioned as the times allowed for meals, shall be deemed to be employed contrary to the provisions of the said recited acts as amended by this act.

Recited acts and this act to be construed as one act.

9. And be it enacted, that the three hereinbefore recited acts as amended by this act, and this act, shall be construed together as one act, and in all respects as if the provisions hereinbefore contained had been contained in the secondly hereinbefore recited act: provided nevertheless, that nothing herein contained shall apply to any offence committed under the said recited acts before the passing of this act, or to any proceedings taken under any of the said acts, and pending at the time of the passing of this act.

Act may be amended, &c.

10. And be it further enacted, that this act may be amended or repealed by any act to be passed in this present session of Parliament.

14 & 15 VICT. C. 11.

An Act for the better Protection of Persons under the Care and Control of others as Apprentices or Servants; and to enable the Guardians and Overseers of the Poor to institute and conduct Prosecutions in certain Cases (l). [20th May, 1851.]

Whereas it is expedient to make provision for the better protection of persons who are under the care and control of others as apprentices or servants: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

Persons refusing or neglecting to supply necessary food to apprentices or servants, or unlawfully assaulting them, guilty of misdemeanor.

1. That where the master or mistress of any person shall be legally liable to provide for such person, as an apprentice or as a servant, necessary food, clothing or lodging, and shall wilfully and without lawful excuse refuse or neglect to provide the same, or where the master or mistress of any such person shall unlawfully and maliciously assault such person whereby the life of such person shall be endangered, or the health of such person shall have been or shall be likely to be permanently injured, such master or mistress shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years.

Costs of prosecution.

2. That the costs and expenses of the prosecution of any such misdemeanor as aforesaid may be allowed and ordered by the court before which the indictment shall be tried, in like manner as the costs of the prosecution in certain cases of misdemeanor under the act of the seventh year of the reign of King George the Fourth, chapter sixty-four, or may be allowed and ordered by the Court of Queen's Bench, in case the indictment shall have been removed into that court, to be paid by the treasurer of the county or other officer who would have been liable to pay under the order of the court in which, but for such removal, the indictment would have been tried.

A register to be kept of young persons hired or taken as servants from any workhouse.

3. That the guardians of every union and of every separate parish under the management of a board of guardians, and the overseers of every parish not in union or under the management of a board of guardians, shall provide and keep a book or books, and shall cause to be registered therein the name of every young person under the age of sixteen who shall thereafter be hired or taken as a servant from the workhouse of such union or parish, together with the several other particulars specified in the schedule hereunto annexed; and every such entry shall be signed by the presiding chairman of such board of guardians at an ordinary meeting thereof, or by some one of such overseers; provided that nothing herein contained shall be taken to supersede or affect the obligation to keep such register of poor children apprenticed by overseers or guardians as is required by the statute of the forty-second year of King George the Third, chapter forty-six, and the statute of the eighth year of Queen Victoria, chapter one hundred and one.

Not to supersede obligation to keep register as required by 42 Geo. 3, c. 46, and 7 & 8 Vict. c. 101.

Young persons hired from work-

4. That where any young person under the age of sixteen shall have been or shall be hired or taken as a servant from the workhouse of any union or parish, or shall have been or shall be bound out as an apprentice by the guardians of any union, or the guardians or

(l) See *ante*, p. 130.

houses or bound out as pauper apprentices to be visited periodically by officer of guardians or overseers.

overseers of any parish, it shall be lawful for such guardians or overseers respectively, and they are hereby required, so long as such young person shall be under the age of sixteen, and shall be known to them to reside as servant or apprentice in the same service into which such young person shall have so gone as a servant from such workhouse or as such apprentice within such union or parish respectively, or within five miles of any part of such union or parish, to cause the relieving officer, or, where there is no relieving officer, then some other officer duly authorized for the purpose, to visit such young person at least twice in every year, and to report to them in writing whether he has found reason to believe that such young person is not supplied with necessary food, or is subjected to cruel or illegal treatment in any respect.

As to young persons hired or bound to masters residing at a distance from unions or parishes.

5. That where any young person under the age of sixteen shall hereafter be hired or taken as a servant from the workhouse of any union or parish, or shall be bound out as an apprentice by the guardians of any union, or by the guardians or overseers of any parish, and the residence of the master or mistress shall be more than five miles from any part of such union or parish, then a written notice of such hiring, taking or binding, specifying the name and age of the apprentice or servant, and the name, description and residence of such master or mistress, shall be forthwith sent from such guardians or overseers to the guardians or overseers of the union or parish in which such master or mistress shall reside; and thereupon it shall become the duty of such last-mentioned guardians or overseers to cause the particulars contained in such notice to be registered in some book or books, to be provided by them for the purpose, together with the name of the union or parish from which such notice shall have been received; and such last-mentioned guardians or overseers shall cause such young person to be visited as frequently and in the same manner in all respects as if such young person had been hired or taken from their own workhouse, or had been bound out as an apprentice by themselves.

Guardians and overseers authorized and required to prosecute in certain cases.

6. That where any complaint shall be made of an offence against this act, or of any bodily injury inflicted upon any poor person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom the examination is taken shall certify under their hands that they deem it necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or of the parish, or where there are no guardians by the overseers of the parish in which the offence shall have been committed, such guardians or overseers, as the case may be, shall, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of the court trying the indictment, or of the Court of Queen's Bench) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers (as the case may be) of such parish.

Costs of prosecution.

Justice empowered to bind over officer of guardians or overseer to prosecute.

7. That in the case of a union or parish under a board of guardians the clerk or some other officer of such union or parish, and in the case of a parish not under a board of guardians one of the overseers thereof, may, if such two justices of the peace before whom the examination is taken shall deem it necessary for the purposes of public

justice and shall certify as hereinbefore mentioned, be bound over to prosecute.

8. That the words "guardians," "union," "overseers," "justice of the peace," "officer," "poor," "parish" and "workhouse," used in this act shall be construed in like manner as in the act of the fifth year of the reign of King William the Fourth, chapter seventy-six. Interpretation of terms.

9. That this act shall extend only to England and Wales. Extent of act.

SCHEDULE.

FORM OF REGISTER.

Name of Child.	Age.	Date of hiring or taking as Servant.	Name of Master or Mistress.	Trade or other description of Master or Mistress.	Residence of Master or Mistress.

16 & 17 VICT. c. 104.

An Act further to regulate the Employment of Children in Factories.
[20th August, 1853.]

Whereas by an act passed in the fourth year of King William the Fourth, intituled "An Act to regulate the Labour of Children and Young Persons in Mills and Factories of the United Kingdom," and an act passed in the seventh year of her Majesty, intituled "An Act to amend the Laws relating to Labour in Factories," and an act passed in the tenth year of her present Majesty, intituled "An Act to limit the Hours of Labour of Young Persons and Females in Factories," and an act passed in the thirteenth and fourteenth years of her Majesty, intituled "An Act to amend the Acts relating to Labour in Factories," the labour of children, young persons and females in factories has been regulated, and by the said last recited act no young person and no female above the age of eighteen years can be employed in any factory before six of the clock of the morning or after six of the clock of the evening, save as therein otherwise provided: and whereas it is expedient that children should not be employed in factories at times during which young persons and women may not now by law be employed therein: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent

3 & 4 Will. 4, c. 103.
7 & 8 Vict. c. 15.
10 & 11 Vict. c. 29.
13 & 14 Vict. c. 54.

of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

No child to be employed before six in the morning nor after six in the afternoon.

1. After the commencement of this act no child shall be employed in any factory before six of the clock in the morning or after six of the clock in the evening of any day (save to recover lost time, as hereinafter provided), and no child shall be employed in any factory either to recover lost time or for any other purpose on any Saturday after two of the clock in the afternoon.

Power to employ children in the hours between seven in the morning and seven in the evening from 30th Sept. to 1st April, under certain regulations.

2. Provided always, that during all or part of the period between the thirtieth day of September of any year, and the first day of April of the following year, children may be employed in any factory, except on Saturday, after six until seven of the clock of the evening, under the following regulations and conditions: (that is to say), notice signed by the occupier of any factory or his agent of the intention to employ children under this provision, specifying the period, not being less than one month, during which they are to be so employed in such factory, shall be given to one of the inspectors of factories; and a notice to the like effect, in such form as shall be approved by such inspector, and signed by such occupier or his agent, and by such inspector, shall be hung or fixed up, according to the directions for other notices in the said secondly recited act, in such factory, and during the period specified in such notice, children may be employed in such factory after six of the clock and not later than seven of the clock of any day except Saturday, and during the period specified in such notice (save to recover lost time, as herein provided), no child shall be employed in such factory before seven of the clock in the morning of any day except Saturday.

Children not to be employed under 7 & 8 Vict. c. 15, s. 36, in recovering lost time, after seven in the evening.

3. And whereas by the said act of the seventh and eighth years of her Majesty it was enacted, that in any factory in which any part of the machinery was moved by the power of water, the time which should have been lost by stoppages from want of water, or from too much water, might be recovered within six months next after the stoppage between the hours specified in the said firstly recited act as those within which time lost by drought or excess of water might be recovered, and that in order to recover time so lost any child or young person might be employed one hour in each day more than the time to which the ordinary daily labour of children and young persons respectively was restricted by law, except on Saturday: be it therefore enacted, that no child shall, in order to recover time so lost as aforesaid, be employed after seven of the clock in the evening of any day; and the times before six of the clock in the morning and after six of the clock in the evening during which any such child is so employed in any day shall not together exceed one hour.

Hours of employment of children not to be extended.

4. Nothing in this act shall be construed to authorize the employment of any children in any factory for any longer time in any day than is now authorized under the said recited acts, or to interfere with or affect the provisions of the said acts as to meal times or holidays, or any other provisions whatsoever of the said acts, save so far as the same authorize the employment of children between any other hours of the day than are limited by this act.

Acts to be construed as one act.

5. The hereinbefore recited acts, as amended by this act, and this act, shall be construed together as one act.

Commencement of act.

6. This act shall commence and take effect on the first day of September, one thousand eight hundred and fifty-three.

18 & 19 VICT. c. 108.

An Act to amend the Law for the Inspection of Coal Mines in Great Britain. [14th August, 1855.]

Whereas an act of the session of Parliament holden in the thirteenth and fourteenth years of her Majesty, chapter one hundred, was passed "for Inspection of Coal Mines in Great Britain:" and whereas, with a view to the safety of the persons employed in such mines, it is expedient that further provision be made for the inspection and regulation thereof: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows: 13 & 14 Vict. c. 100.

1. The said act of the thirteenth and fourteenth years of her Majesty shall be repealed: provided always, that the inspectors of coal mines appointed under such act shall continue to be such inspectors under this act, subject, nevertheless, to removal by one of her Majesty's principal Secretaries of State: provided also, that all penalties incurred under the said act before the repeal thereof may be proceeded for and applied as if this act had not been passed. 13 & 14 Vict. c. 100, repealed.

2. It shall be lawful for one of her Majesty's principal Secretaries of State from time to time to appoint any fit person or persons to be an inspector or inspectors of coal mines, and from time to time to remove any such inspector or inspectors; and notice of the appointment of every such inspector shall be published in the London Gazette. Power to Secretary of State to appoint inspectors of mines.

3. No person who shall act or practise as a land agent, or as a manager, viewer or agent, or mining engineer, or valuer of mines, or arbitrator in any matters of dispute arising between owners of mines, or be otherwise employed in any coal mine or colliery, shall act as an inspector of coal mines under this act. No land agent or manager, &c. of coal mine to act as inspector.

4. The following rules (hereinafter referred to as the general rules) shall be observed in every coal mine and colliery by the owner and agent thereof: General rules to be observed in all coal mines.

1. An adequate amount of ventilation shall be constantly produced at all collieries to dilute and render harmless noxious gases to such an extent as that the working places of the pits and levels of such collieries shall under ordinary circumstances be in a fit state for working:
2. Every shaft or pit which is out of use, or used only as an air pit, shall be securely fenced:
3. Every working and pumping pit or shaft shall be properly fenced when not at work:
4. Every working and pumping pit or shaft where the natural strata under ordinary circumstances are not safe shall be securely cased or lined:
5. Every working pit or shaft shall be provided with some proper means of signalling from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft:
6. A proper indicator to show the position of the load in the pit or shaft, and also an adequate break, shall be attached to every machine worked by steam or water power used for lowering or raising persons:
7. Every steam boiler shall be provided with a proper steam gauge, water gauge, and safety valve.

5. In addition to the general rules, there shall be established and observed in every coal mine or colliery such other rules (hereinafter Special rules to be made

for each colliery, with the approval of Secretary of State.

referred to as special rules) for the conduct and guidance of the persons acting in the management of such coal mine or colliery, and of all persons employed in or about the same, as under the particular state and circumstances of such coal mine or colliery may appear best calculated to prevent dangerous accidents: and such special rules for each coal mine or colliery shall be framed by the owner thereof, and forthwith transmitted to one of her Majesty's principal Secretaries of State; and such rules, if not objected to by such Secretary of State within forty days from the day upon which they are received by him, shall be established; and in case such Secretary of State shall be of opinion that such rules or any of them do not sufficiently provide for the safety of the person or persons employed in or about such coal mine or colliery, it shall be lawful for such Secretary of State, within the forty days aforesaid, to propose any alterations in or additions to such special rules; and in case such owner shall not within twenty days from the day on which such alterations or additions are proposed to him object to the same, the special rules shall be established with such alterations and additions; and in case such owner shall, within the said twenty days, object to such alterations or additions, or any of them, it shall be lawful for such owner, within seven days after he shall have so objected, to nominate three or more practical mining engineers, or other competent persons of experience in the district within which such coal mine or colliery is situate, and who shall not be interested in or employed in the management of such coal mine or colliery, of whom such Secretary of State may appoint one or more, to determine the matter in difference, and to decide what special rules shall be established in such coal mine or colliery; and if such owner shall not within such seven days nominate such mining engineers as aforesaid, or if such Secretary of State shall not within one month from the time of such nomination appoint one or more of the persons so nominated by the owner as aforesaid, then and in such case two such mining engineers or other competent persons as aforesaid shall be appointed, one of whom shall be named by the owner of such coal mine or colliery, and one by the Secretary of State; and the said persons so appointed shall, before they proceed to determine the matters in difference, and to decide what special rules shall be established in such coal mine or colliery, appoint a third person, being such mining engineer or such other competent person as aforesaid, to be their umpire in case of difference of opinion between them; and the determination of such persons and the said umpire, or of any two of them, shall be final, and the special rules shall be established accordingly: provided, that after such rules are established it shall be lawful for the owner of any coal mine or colliery (or for the Secretary of State) to propose from time to time any amendments of such rules, which amendments, if not objected to by the Secretary of State within the time aforesaid, or owners, as the case may be, shall be established; and in case of objection being made to any of them, and of a difference arising out of such objection, the same proceedings shall be had respecting them as hereinbefore provided in reference to the special rules when originally submitted to such Secretary of State, and objected to: provided also, that the amount of payment to be made to all such persons, and to such umpire so nominated or appointed as aforesaid, for their services, shall be fixed by such Secretary of State, and paid in equal moieties by such owner and the commissioners of her Majesty's Treasury, who are hereby authorized to make such payment accordingly.

Publication of rules.

6. For the purpose of making known the general rules and special rules to all persons employed in or about each coal mine or colliery, the owner thereof shall cause the general rules and the special rules for such coal mine or colliery to be painted on a board or printed upon paper to be pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal office or place of business of the coal mine or colliery; and the general rules and special rules so painted or printed and hung up shall be renewed and restored with all reasonable despatch as often as the same or any part thereof may be defaced, obliterated or destroyed; and a printed copy of such general and special rules shall be supplied to all persons employed in and about the same.

Powers and duties of inspectors.

7. It shall be lawful for any inspector to enter, inspect and examine any coal mine or colliery, and the works and machinery belonging thereto, at all reasonable times and seasons, by day or night, but so as not to impede or obstruct the working of the said coal mine or colliery, and to make inquiry into and touching the state and condition of such coal mine or colliery, works and machinery, and the ventilation of such mine or colliery, and the mode of lighting or using lights in the same, and into all matters and things connected with or relating to the safety of the persons employed in or about the same, and especially to make inquiry whether the provisions of this act are complied with in relation to such coal mine or colliery; and the owner or agent of such coal mine or colliery is hereby required to furnish the means necessary for such entry, inspection, examination and inquiry; and if such inspector find any of the general rules or any of the special rules established for such coal mine or colliery to be neglected or wilfully violated, such inspector shall forthwith give notice in writing thereof to the owner or agent of such coal mine or colliery; and if such inspector find any part of such coal mine or colliery, works or machinery, or any aircourses, airdoors, waterways, drains, pits, levels, shafts or other matter or thing in or connected with such coal mine or colliery, or the mode of lighting or using lights in the same, to be otherwise dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person employed in or about such coal mine or colliery, such inspector shall thereupon, by notice in writing, summon before him at the colliery office the manager or principal colliery viewer or agent having charge of the said coal mine or colliery, in order to his being heard upon the matter giving rise to such finding as aforesaid; and if such manager or principal colliery viewer or agent do not attend after reasonable notice, or having attended fail to satisfy such inspector, then such inspector shall serve notice in writing of the particular grounds on which he is of opinion that the said coal mine or colliery or any part thereof, or any other of the particulars above mentioned, is dangerous or defective on the owner or agent thereof, and shall also report the same to one of her Majesty's principal Secretaries of State, and in case of any difference arising thereupon the same shall be determined in the manner hereinbefore provided with respect to proposed alterations or additions to the special rules, and a copy of such notice in case of no such difference as aforesaid, or of the determination in case of such difference arising, shall, if the said danger or defect be not forthwith removed or remedied, and if the Secretary of State shall so direct, be hung up or affixed on some conspicuous part of the principal office or place of business of the coal mine or colliery, and a copy supplied to every workman to whom such notice or determination shall apply, such copy so to be hung up or affixed as aforesaid to be removed

on the certificate of the inspector of the district, or of the persons by whom such determination shall have been made, that such danger or defect has been removed or remedied: provided always, that so long as any copy of such notice or determination purporting that the coal mine or colliery, or any part thereof, or any other of the particulars above mentioned, is dangerous or defective, shall remain so hung up or affixed, and the danger or defect notified therein shall not be removed or remedied, it shall be lawful for any person employed in or about such coal mine or colliery to discontinue his service in any part of such coal mine or colliery to which part the said notice or determination shall apply, without being therefore liable to be proceeded against under the act passed in the fourth year of the reign of his late Majesty King George the Fourth, chapter thirty-four, as for absence from his service, or misconduct in the execution thereof: provided also, that unless the owner or agent on whom the notice is served as aforesaid shall within seven days of such service signify to the said inspector his objections to the same, and at the same time nominate three competent persons as hereinbefore provided in the fifth section, with a view to the determination of such objection, such notice shall be considered good and valid, and shall be hung up or affixed as hereinbefore provided.

Owners of coal mines to produce maps or plans of mines to inspector.

If owners do not produce maps, &c., inspector may require them to be made.

8. The owner or agent of every coal mine or colliery shall, on the occasion and for the purpose of the inspection and examination thereof, produce and submit for examination to any such inspector as aforesaid, a map or plan of the workings of such coal mine or colliery, upon which map or plan shall be delineated the several parts, aircourses, airdoors, waterways, drains, pits, levels and shafts in and connected with such coal mine or colliery; and if such owner or agent do not produce and submit for examination as aforesaid such a map or plan as aforesaid, or if any such inspector as aforesaid find that any portion of any map or plan is withheld, or any part of the workings of any such mine or colliery is concealed from his inspection, or if he find, on examining and verifying any map or plan, that the same is imperfect or inaccurate, he is hereby empowered to require that an accurate map or plan of the actual workings of such coal mine or colliery, and the works thereto belonging, clearly delineating such matters and things as aforesaid, be made within a reasonable time, by and at the expense of the owner of such mine, on a scale of not less than two chains to one inch, or on such other scale as the plan then used in the colliery is constructed on; and every such map or plan as aforesaid shall show the workings of the mine up to within six months of the time of inspection; and the owner or agent of the coal mine or colliery shall, if required so to do by any such inspector as aforesaid, mark or cause to be marked on such map or plan the progress of the workings of the coal mine or colliery up to the time of his inspection thereof: provided, that nothing herein contained shall be construed to authorize any inspector to make a copy of the whole or any part of a map or plan which shall be produced or made.

Notice of accidents in mines to be given to Secretary of State.

9. If and when loss of life to any person employed in or about any coal mine or colliery occurs by reason of any accident within such coal mine or colliery, or any pits or shafts thereof, or any works or machinery connected with such pits or shafts, or if any serious personal injury arises from explosion therein, the owner or agent of such mine or colliery shall, within twenty-four hours next after such loss of life, send notice of such accident, under the hand of such owner or agent, to one of her Majesty's principal Secretaries of State,

and in Scotland to the Lord Advocate, and in all cases to the inspector of the district within which such loss of life (*a*) shall occur, and shall specify in such notice the probable cause of such accident, and such notice may be sent through the post office, by letter addressed to such Secretary of State or Lord Advocate, and to the inspector of the district at his usual place of residence: and every owner or agent who neglects to send or cause to be sent such notice as aforesaid within the time aforesaid shall for such offence be liable to a penalty of not less than ten pounds and not exceeding twenty pounds.

Provision for giving notice to Secretary of State of holding inquests on deaths from accidents in coal mines.

10. Every coroner holding an inquest upon the body of any person whose death may have been caused by any such accident as aforesaid shall (unless some person be present on behalf of one of her Majesty's principal Secretaries of State to watch the proceedings at such inquest, or notice of such accident shall have been sent, four clear days at the least previously thereto, through the post office, by letter addressed to one of such Secretaries of State, and the sending of the same be proved to the satisfaction of the coroner), adjourn such inquest, and by letter sent two days at the least before holding such adjourned inquest, through the post office, addressed to one of such Secretaries of State, give notice to such Secretary of State of the time and place of holding the same: provided always, that it shall be lawful for such coroner, before the adjournment of any such inquest, to take evidence to identify the body, and to order the interment thereof.

Penalties for offences against this act.

11. If after the thirty-first day of December one thousand eight hundred and fifty-five any coal mine or colliery be worked, and, through the default of the owner thereof, special rules have not been established for the same, according to the provisions of this act, or the general rules, or the special rules for such coal mine or colliery, by this act required to be established, have not been hung up or affixed, or have not, after obliteration or destruction, been renewed or restored, as required by this act, or any of such general rules or special rules which ought to be observed by the owner and principal agent or viewer of such coal mine or colliery be neglected or wilfully violated by any such owner, agent or viewer, such person shall be liable to a penalty of not exceeding five pounds, and also, in case the default or neglect be not remedied with all reasonable despatch, after notice in writing thereof given by an inspector to the owner or agent of such coal mine or colliery, to a further penalty of not exceeding one pound for every day during which the offence continues after such notice; and every person, other than aforesaid, employed in or about a coal mine or colliery, who neglects or wilfully violates any of the special rules established for such coal mine or colliery, shall for every such offence be liable to a penalty not exceeding two pounds, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any period not exceeding three calendar months, or to be proceeded against and punished according to the provisions of the act fourth George the Fourth, chapter thirty-four, intituled "An Act to enlarge the Power of Justices in determining Complaints between Masters and Servants." 4 Geo. 4, c. 34.

Penalty for obstructing inspectors.

12. Every owner or principal agent of any coal mine or colliery who refuses or neglects to produce, as hereinbefore required, a map or plan of the workings of a colliery to any inspector, or to furnish

(*a*) When an accident in a mine is not attended with *loss of life*, but only with *personal injury*, the owner, &c., cannot be convicted under this section for not sending the notices required by it, *Underhill* v. *Longridge*, 29 L. J., M. C. 65.

to said inspector the means necessary for making any entry, inspection, examination or inquiry under this act, and every person who wilfully obstructs any inspector in the execution of this act, shall, for every such offence, be liable to a penalty of not less than five pounds and not exceeding ten pounds.

Penalty for defacing notice used for such publication.

13. Every person who pulls down, injures or defaces any notice hung up or affixed as required by this act shall for every such offence be liable to a penalty of not exceeding forty shillings.

Penalties, how recoverable.

14. All penalties imposed by this act may be recovered in a summary manner before two justices of the peace, or in Scotland before the sheriff having jurisdiction in the county or place where the offence is committed, within three months of the commission of the same, in the manner prescribed by the law in that behalf; and it shall be lawful for the commissioners of her Majesty's Treasury, upon the recommendation of one of her Majesty's principal Secretaries of State, to direct that any penalty imposed for neglecting to send or cause to be sent notice of any accident, as required by this act, shall be paid to or among any of the family or relatives of any person or persons killed by such accident, as he may think fit; and, save as aforesaid, all penalties imposed by this act shall, when recovered, be paid, for the use of her Majesty, to the sheriff or other proper officer of the county, riding, division or place for which the justices or other competent authority before whom the penalty is recovered shall have acted.

Certified copy of special rules to be evidence.

15. A copy of the special rules for the time being established in any coal mine or colliery, certified under the hands of one of the inspectors to be a copy of the special rules established in such coal mine or colliery, shall be evidence of such special rules, and of their being duly established under this act, without further proof.

Reports of inspectors to be laid before Parliament.

16. Every inspector shall on or before the first day of March in every year make a separate and distinct report in writing of his proceedings during the preceding year, and shall transmit the same to one of her Majesty's principal Secretaries of State, and a copy of such report shall be laid before both houses of Parliament.

Interpretation of terms.

17. In the construction of this act the term "owner" of a coal mine or colliery shall mean the immediate proprietor, lessee or occupier of a coal mine or colliery, or of any part thereof; and the term "agent" of a mine shall mean any person having on behalf of the owner of any mine the care or direction thereof; and the term "inspector" or "inspectors" shall respectively mean an inspector or inspectors of coal mines appointed under the said act of the thirteenth and fourteenth years of her Majesty or this act; and the term "district" shall mean that portion of Great Britain which shall be assigned to any one of such inspectors.

"Owner."

"Agent."

"Inspector."

"District."

Extent of act.

18. This act shall not extend to Ireland.

Term of this act.

19. This act shall continue until the expiration of five years after the passing of this act, and thenceforth until the end of the then next session of Parliament.

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19 & 20 Vict. c. 38.

An Act for the further Amendment of the Laws relating to Labour in Factories. [30th June, 1856.]

7 & 8 Vict. c. 15.

Whereas an act was passed in the session of Parliament held in the seventh and eighth years of her present Majesty's reign, chapter fifteen, intituled "An Act to amend the Laws relating to Labour in

Factories:" and whereas by section twenty-one of the said act it was amongst other things enacted, that all parts of the mill-gearing in a factory should be securely fenced; and by section forty-three of the said act provision was made for referring to competent persons as arbitrators all questions relating to machinery which an inspector or sub-inspector might observe in a factory not securely fenced, and which he might deem to be likely to cause bodily injury, and of which he should give notice to the occupier of a factory; and by sections fifty-nine and sixty certain penalties are incurred for not fencing such machinery, and for any accident arising from such non-fencing, and for any disobedience of the notice given by such inspector or sub-inspector: and whereas doubts have arisen as to the true construction of the said several sections; and it is expedient that such doubts should be removed, and that the aforesaid provision of the said act should be explained and amended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This act may be cited for any purpose as "The Factory Act, 1856."

Commencement of act.

2. This act shall commence and take effect on and from the first day of June one thousand eight hundred and fifty-six.

Recited act and this act to be one.

3. The said recited act and this act shall be construed and executed as if they were one act.

Sect. 21 to apply only to mill-gearing liable to come into contact, &c.

4. The said section twenty-one, so far as the same refers to the mill-gearing, shall apply only to those parts thereof with which children and young persons and women are liable to come in contact, either in passing or in their ordinary occupation in the factory.

The word "machinery" in Sect. 43 to extend to other mill-gearing.

5. The word "machinery" in the said section forty-three shall be considered as applicable to and including all other parts of the mill-gearing in a factory with which children and young persons are not liable to come in contact in passing or in their ordinary occupation in the factory; and the word "machinery," in the twenty-fourth, forty-second, fifty-ninth, and sixtieth sections of the said act shall be considered as applicable to and as including mill-gearing.

Penalty for not fencing machinery after notice.

6. Where, under the said section forty-three as amended by this act, an inspector or sub-inspector gives notice in writing to the occupier of a factory or his agent in relation to any part of the machinery or any driving strap or band not securely fenced which such inspector or sub-inspector deems likely to cause bodily injury to any person employed in the factory, if the occupier of such factory do not within the time in this behalf limited by the said section make application in writing for referring the question of the fencing of the machinery, strap or band to which the notice refers to arbitration, and with the least possible delay appoint an arbitrator, or if the decision in any such arbitration be that it is necessary and possible to fence the said machinery, strap or band, the occupier of the factory shall be liable to a penalty of not less than five pounds and not more than twenty pounds if he do not within a reasonable time after such notice or decision (as the case may be) cause such machinery, strap or band to be well and securely fenced, and at all times thereafter keep the same well and securely fenced.

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